Supreme Court, U.S.
FILED

No. 941017

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL ADAMS, ET AL.,

Petitioners,

v.

DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

J. EDWARD DAVIS,
HILLARY GALLOWAY DAVIS,
JOHN F. CONWELL,
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QUESTION PRESENTED FOR REVIEW

Whether the deprivation by the Respondents of the layoff rights guaranteed the Petitioners under the Merit System of the Annotated Code of Maryland, violates the prohibition against a taking of property without due process of law found in the United States Constitution.

LIST OF PARTIES

A. Those parties listed in the caption of this case are Petitioners herein.

B. The following parties were Grievants in the proceedings at the Office of Administrative Hearings:

1. Martin Salisbury, Employee of the Maryland Department of PI;

2. Albert Jennings, Employee of the Maryland Department of Public Safety & Correctional Services;

3. Walter Payton, Employee of the Maryland State Police;

4. Glendora Gordon, Employee of the Maryland State Department of Public Safety & Correctional Services;

5. Gregory Moore, Employee of the Maryland Correctional Adjustment Center;

6. Jess Defonzo, Employee of the MPRS;

7. Donna Webster, Employee of the Maryland Correctional Institution - Hagerstown;

8. George Drake, Employee of the Roxbury Correctional Instituiton;
9. Sharon Couleter, Employee of the Roxbury Correctional Institution;

10. Mary E. White, Employee of the Maryland Correctional Training Center;

11. Joseph Cromer, Employee of the Maryland State Police;

12. Paul Gross, Employee of the Maryland State Police;

13. Craig Lee Sullivan, Employee of the Maryland Correctional Instituiton - Hagerstown;

14. Alice Siegel, Employee of the Maryland State Police;

15. Conway Bailey, Employee of the Maryland House of Corrections;

16. Ronald S. Bridge, Employee of the Maryland Correctional Instituiton - Jessup;

17. Diane J. Bell, Employee of the Maryland State Police;

18. Richard Bohn, Employee of the Maryland Department of Public Safety & Correctional Services;

19. Helen C. Howard, Employee of the Maryland Department of Juvenile Services;

20. John Sippio, Employee of the Maryland Department of Juvenile Services;

21. Robert C. Kelly, Employee of the

Maryland Department of Juvenile Services;

22. Karen Simms, Employee of the Maryland Department of General Services;

23. Clarence Johnson, Employee of the Maryland Department of General Services;

24. John A. Evans; Employee of the Maryland Department of Licensing & Regulation;

25. Victoria Lane, Employee of the Maryland Department of Environment;

26. John C. Reese, Employee of the Maryland Department of General Services;

27. Jeffrey Wachter, Employee of the MCPB;

28. Lillian Owens, Employee of the Maryland Schools for the Deaf;

29. Wylie Campbell, Employee of the Maryland Department of Personnel;

30. Edgar Kaufman, Employee of the MCPB;

31. Patrick E. Miller, Employee of the Maryland Schools for the Deaf;

32. Lola Steele, Employee of the

Maryland Schools for the Deaf;

33. Helen Eisenhardt, Employee of the Maryland Schools for the Deaf;

34. Eugene Caster,, Employee of the Maryland Correctional Institution - Jessup;

35. Richard K. George, Employee of the MCPB;

36. Janet Gaylon, Employee of the Maryland State Police;

37. Geraldine Mendelson, Employee of the Maryland Department of Health & Mental Hygiene;

38. George Leith, Employee of the Maryland Department of Juvenile Services;

39. Harry W. Grove, Employee of the Maryland Department of Juvenile Services;

40. Frank Johnson, Employee of the Maryland Department of Licensing & Regulation;

41. Katherine Murray, Employee of the Maryland Department of Juvenile Services;

42. Christine Siegmann, Employee of the Eastern Correctional Institution;

43. Berline Dunnock, Employee of the

Maryland Department of Juvenile Services;

44. Rosaline Anderson, Employee of the Maryland Department of General Services;

45. Celestine Morgan, Employee of the Maryland Department of Personnel;

46. Eugene Austin, Employee of the Maryland Department of Personnel;

47. Elmer Falconer, Employee of the Maryland Department of Personnel;

48. Michael Adams, Employee of the Maryland PI;

49. William Buettner, Employee of the Maryland PI;

50. Anthony Demma, Employee of the Maryland PI;

51. Leonard Finkelstein, Employee of the Maryland PI;

52. Barbara Hayes, Employee of the Maryland PI;

53. Frederick Moyer, Employee of the Maryland PI;

54. James Orzolek, Employee of the Maryland PI;

55. Charles Schultz, Employee of the Maryland PI;

56. Donald Seymour, Employee of the Maryland PI;

57. Robert Wooldridge, Employee of the Maryland PI;

58. Richard Youngbar, Employee of the Maryland PI;

59. Howard Younger, Employee of the Maryland PI;

60. Mary Ann Brylske, Employee of the Maryland Department of Public Safety & Correctional Services;

61. Gregory Moore, Employee of the Maryland Correctional Adjustment Center;

62. Christine Siegmann, Employee of the Eastern Correctional Instituiton;

63. Cora McBridge, Employee of the Eastern Correctional Institution;

64. Claudia Nelson, Employee of the Eastern Correctional Institution;

65. Donna Webster, Employee of the Maryland Correctional Institution - Hagerstown;

66. Alice Siegle, Employee of the Maryland State Police;

67. John Witmer, Employee of the Maryland Correctional Training Center;

68. Arthur Ray, Employee of the Maryland Department of Public Safety & Correctional Services;

69. Denise Cheney, Employee of the Maryland Department of Public Safety & Correctional Services;

70. Michael Greise, Employee of the Maryland Department of Juvenile Services;

71. Arthur Femi, Employee of the Maryland Department of Juvenile Services; and

72. Robert Kelley, Employee of the Maryland Department of Juvenile Services.

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The Opinion of the Court of Appeals of Maryland, No. 79 of the 1992 September Term, filed September 9, 1994 appears at Appendix A, reported at 336 Md. 105 (1994), 647 A.2d 96.

The unreported opinion and order of the Circuit Court for Anne Arundel County, Maryland, issued June 8, 1992, appears at Appendix B.

The final order of the Administrative Law Judge of the Office of Administrative Hearings of Maryland, dated March 12, 1992 appears at Appendix C.

JURISDICTION

The opinion and judgment of the Maryland Court of Appeals was rendered in this case on September 9, 1994. This Petition for a Writ of Certiorari was filed

within 90 days of September 9, 1994 as is required by 28 U.S.C. § 2101(c), and Rule of the Supreme Court 13.1. Jurisdiction of this Court is evoked under the provisions of 28 U.S.C. § 1257.

STATUTES AND RULES INVOLVED

1. United States Constitution, Amendment XIV, Section One:

> All persons born or naturlaized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Maryland Annotated Code, Article 64A, Section 35 (1988):

> §35. Laying off employees.

(a) Applicability. -- The provisions of this section that govern the layoff and

reinstatement of unclassified employees do not apply to the Board for the Injured Workers Insurance Fund or the unclassified employees of the central collection unit.

(b) In general. -- Employees who are in positions that are to be abolished, discontinued, or vacated, because of a change in departmental organization or a stoppage or lack of work, shall be laid off.

(c) Secretary to establish procedures. -- Except for faculty and other unclassified employees of the State institutions of higher education and their governing boards, the Secretary of Personnel shall establish uniform procedures among State agencies, by rule and regulation, for:

(1) The layoff of State employees regardless of employment status;

(2) the reinstatement of laid-off classified and unclassified State employees to comparable occupational positions in State employment.

3. Maryland Annotated Code, State Finance and Procurement, section 7-213:

(a) *Authorized.* -- Except as provided in subsection (b) of this section, with the apporval of the Board of Public Works, the Governor may reduce, by not more than 25%, any appropriation that the Governor considers unnecessary.

(b) *Exclusions.* -- (1) The Governor

may not reduce an appropriation to the Legislative Branch or the Judicial Branch of the State government.

(2) The Governor may not reduce an appropriation for:

(i) payment of the principal of or interest on the State debt;

(ii) public schools; or

(iii) the salary of a public officer, during the term of office.

(3) Except as provided in the Merit System Law, the Governor may not reduce an appropraition for the salary of an employee in the classified or unclassified service.

4. Code of Maryland Regulations, Title 06, Department of Personnel, Section 06.01.01.44:

B. Employees who are in positions that are to be abolished, discontinued, or vacated because of change in departmental organization or because of work stoppage or lack of work shall be laid off.

B-1. The appointing authority shall notify the Secretary in writing of the number of positions abolished, discontinued, or vacated, together with the reasons for them, and the list of names of employees to be laid off. The Secretary shall review the written notice and certify that the order of layoff is appropriate. The appointing authority shall notify employees who are to be laid off at least 90 calendar days before the effective date of the layoff.

* * *

D. Sequence of Layoff.

(1) An appointing authority first shall lay off employees who are on a temporary basis pending examination (TP), and who are in the classification in which the layoff is to occur, in accordance with §F of this regulation.

(2) The appointing authority next shall lay off employees who are serving an original probationary period, and who are in the classification in which the layoff is to occur, in accordance with §F of this regulation.

(3) The appointing authority next shall lay off permanent employees who have completed an original probationary period, and who are in the classification in which the layoff is to occur, in order of seniority, with the employee having the lowest number of seniority points being laid off first.

* * *

G. An employee in a position which is to be abolished, discontinued, or vacated shall be allowed to displace another employee with the least seniority in the same job classification, or, if not available, either:

(1) Progressively to each lower level classification in the same job series; or

(2) In any other job classification in

which the employee held satisfactory permanent status.

STATEMENT OF THE CASE

A. The Proceedings Below

As a result of action by the Governor and the Board of Public Works on October 23, 1991, the Petitioners, all employees of the State of Maryland whose positions were abolished, filed grievances complaining that their positions had been abolished in violation of Code of Maryland Regulations 06.01.01.44 and the Merit System Law, Maryland Annotated Code, Article 64A, §35 (1988). The Petitioners requested to be reinstated and provided all the provisions of the Merit System Law and COMAR 06.01.01.44.

On February 25, 1992, Administrative Law Judge Sondra L. Mackel found that Petitioners have rights under the layoff statute, Maryland Annotated Code, Article

64A, §35 (1988), and in a final order dated March 12, 1992 (Appendix C), directed the various state agencies to apply the layoff regulation to the Petitioners.

On March 13, 1992, the State of Maryland noted an appeal to the Circuit Court for Anne Arundel County. Legal argument was heard in the Circuit Court for Anne Arundel County before the Honorable Raymond G. Thieme, Jr. on May 12, 1992. Judge Thieme characterized the issue as "whether the Merit System layoff provisions ... apply when State employees jobs were abolished as a result of a budget reduction ... by the Governor, with the approval of the Board of Public Works." (Appendix B, p. Appendix 45). The Petitioner continued to assert that the State was depriving employees of their vested property without the process due. (Appendix E). On June 8,

1992, Judge Thieme issued an Order and Opinion reversing the Judgment of the Office of Administrative Hearings (Appendix B).

An Appeal was noted to the Maryland Court of Special Appeals on July 7, 1992. On July 16, 1992, a Petition for a Writ of Certiorari to the Maryland Court of Appeals was filed by Petitioners, to which the State of Maryland concurred. The Maryland Court of Appeals granted review on September 21, 1992.

The Maryland Court of Appeals consolidated this case with another, (Worker's Compensation Commission v. Norman Driver and Joan N. Parker, argued before the Maryland Court of Appeals on December 8, 1992). These were then placed on an accelerated track. The Petitioners again invested considerable space to the property

rights denied by the State of Maryland in their Brief. Oral arguments were heard on December 8, 1992. Judge Eldridge wrote the decision, issued September 9, 1994 (Appendix A). Nowhere in the decision does Judge Eldridge address the Constitutional concerns we reiterate below.

B. Statement of Relevant Facts

Each of the Petitioners was employed with the State of Maryland in classified and unclassified positions at the time their jobs were abolished. The abolition of the positions was the result of a series of actions of the various state agencies in which the Petitioners were employed, those agencies taking the actions under the direction of the Governor and the Board of Public Works.

On October 2, 1991, the Governor and the Board of Public Works ("the Board")

met and discussed Miscellaneous Item 12-GM providing for positions to be abolished by department and independent agency. This action was approved by the Board. Subsequently, Department of Budget and Fiscal Planning Secretary Charles Benton requested that various state agencies provide him with a list of positions to be abolished by the Board at its October 23, 1991 meeting. The agencies responded, including the Office of the Attorney General, the Office of the State Prosecutor, the Maryland State Archives, the Military Department, the Commission on Human Relation, among others. In response to Secretary Benton's request the various management level authorities listed by PIN number (personal identification number), class code, and position title, positions to be abolished by the Board at its October

23, 1991 meeting. Each Agency also provided proposed termination dates.

At an October 23, 1991 meeting the Board passed Miscellaneous Item 2-S which provided "the positions described in the attached documents shall be abolished effective at the close of business on the dates identified in the attached documents". The documents referred to are the responses from the various agencies to Secretary Benton indicating the positions the different agencies recommended be abolished and the dates for termination. These specific jobs were subsequently abolished on the dates selected by the agencies and identified on the attachments.

Each of the Petitioners lost their job by virtue of the decisions of the Governor of the State of Maryland and the October 23, 1991 Board action. All were terminated

by January 1, 1992, and none were given the benefit of the rights described in Maryland Annotated Code Article 64A, §35 (1988)[1] and Code of Maryland Regulations ("COMAR") 06.01.01.44 for employees in positions that are to be abolished. Those rights include a sequence of layoff based on position type (temporary, contractual, probationary, permanent) the right to displace employees with less seniority and ninety-days notice prior to termination.

As a result of recodification by Ch. 10 of the Acts of 1993, the provisions of former Article 64A, Section 35 of the Annotated Code of Maryland are new found in Annotated Code of Maryland, (1993), Section 9-501 through 9-506 of the State Personnel and Pensions Article. However, it was Article 64A, Section 35, which was in effect when the events of this action took place.

ARGUMENT

The layoff rights given the Petitioners under the Merit System of the Annotated Code of Maryland are property interests, the deprivation of which by any branch of the government violates the prohibition against a taking of property without due process of law found in the United States Constitution.

Petitioners' federal constitutional claim depends on their having had a property right in continued employment. The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects interests of life, liberty, and property, and this Court has repeatedly and emphatically recognized that government employees have a constitutionally protected property interest in their continued employment.

The General Assembly of Maryland has created a property interest in layoff

rights, rights to which Petitioners have been deprived in violation of the Due Process Clause of the United States Constitution.

Petitioners were all employees within the meaning of Maryland's Merit System Law found in Article 64A, §35. Appropriations existed in Maryland's state budget for Petitioners' positions for Fiscal Year 1992. Subsequent to being notified of the termination of their positions, Petitioners requested, and were denied the rights described in Article 64A, §35 and implemented by COMAR 06.01.01.44. COMAR 06.01.01.44 provides:

> B. Employees who are in positions that are to be abolished, discontinued, or vacated because of change in departmental organization or because of work stoppage or lack of work shall be laid off.
>
> B-1. The appointing authority shall notify the Secretary in writing of the number of positions abolished,

discontinued, or vacated, together with the reasons for them, and the list of names of employees to be laid off. The Secretary shall review the written notice and certify that the order of layoff is appropriate. The appointing authority shall notify employees who are to be laid off at least 90 calendar days before the effective date of the layoff.

* * *

D. Sequence of Layoff.

(1) An appointing authority first shall lay off employees who are on a temporary basis pending examination (TP), and who are in the classification in which the layoff is to occur, in accordance with §F of this regulation.

(2) The appointing authority next shall lay off employees who are serving an original probationary period, and who are in the classification in which the layoff is to occur, in accordance with §F of this regulation.

(3) The appointing authority next shall lay off permanent employees who have completed an original probationary period, and who are in the classification in which the layoff is to occur, in order of seniority, with the employee having the lowest number of seniority points being laid off first.

* * *

G. An employee in a position which is to be abolished, discontinued, or vacated shall be allowed to displace another employee with the least seniority in the same job classification, or, if not available, either:

(1) Progressively to each lower level classification in the same job series; or

(2) In any other job classification in which the employee held satisfactory permanent status.

The individual State agencies denied these rights to Petitioners under a claim that the positions were abolished by "operation of law", that Petitioners had no rights under the Merit System Law, and that their complaints were not grievable.

The mere fact that the Appellant's positions were abolished by an act of the Board does not exempt the various agencies from applying the law as it exists; indeed, Maryland State Finance and Procurement Code

Ann. §7-213 (1984), which empowers the Governor to make budget reductions (including the elimination of employees' salaries) with the approval of the Board, requires the Governor to do so in accord with the Merit System Law. Specifically, SF&P §7-213 (b)(3) provides, "**Except as provided in the Merit System Law**, the Governor may not reduce an appropriation for the salary of an employee in the classified or unclassified services."

The State had an obligation to comply with Petitioners' layoff rights under Maryland's Merit System Law, found in Article 64A, §35 (1988). That section provides in pertinent part:

> §35. Laying off employees.
>
> (a) Applicability. -- The provisions of this section that govern the layoff and reinstatement of unclassified employees do not apply to the Board for the Injured Workers Insurance Fund or the unclassified employees of the

central collection unit.

(b) In general. -- Employees who are in positions that are to be abolished, discontinued, or vacated, because of a change in departmental organization or a stoppage or lack of work, shall be laid off.

(c) Secretary to establish procedures. -- Except for faculty and other unclassified employees of the State institutions of higher education and their governing boards, the Secretary of Personnel shall establish uniform procedures among State agencies, by rule and regulation, for:

(1) The layoff of State employees regardless of employment status;

(2) the reinstatement of laid-off classified and unclassified State employees to comparable occupational positions in State employment.

This section guarantees employees "in position(s) that are to be abolished" with specific rights, particularly a uniform procedure for that layoff, displacement, and reinstatement. Other subsections in §35 detail those rights, and they are implemented by COMAR 06.01.01.44 under the

power granted to the Secretary in Art. 64A, §35(c). It is clear that this section is intended to provide employees who are in positions that are to be abolished adequate notice, a fair method of termination, the opportunity for reinstatement, and the opportunity to displace other employees with lesser seniority in the same classification. In short, it is intended to provide the fairest means possible of dealing with an unpleasant necessity - the elimination of positions because of budgetary needs.

The Governor, under State Finance and Procurement Article §7-213(a), has the authority, with the approval of the Board of Public Works, to reduce by no more than 25% appropriations that the Governor considers unnecessary. In executing this law in the present case, the Governor and

the Board reduced appropriations for various positions which were selected by the appointing authorities of the state agencies, thereby abolishing the positions of Petitioners.

The Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights both provide that citizens may not be deprived by the state of their property without due process of law. The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests in specific benefits that a person has already acquired. Board of Regents v. Roth, 408 U.S. 564 (1972). One of the traditional manifestations of a deprivation of property without due process of law is found where the legislature takes away a private party's right to recover property that is

due, subsequent to the citizen's establishment of that right. Forbes Pioneer Boat Line v. Board of Commissioners, 258 U.S. 338 (1922); Vytar Associates v. City of Annapolis, 301 Md. 558, 483 A.2d 1263 (1984).

In 1972, this Court issued in one day two landmark rulings - Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972). These two cases established that governmental employment is a property right within the meaning of the United States Constitution, and the Attorney General of Maryland has approved of this principle in light of the Maryland Declaration of Rights. 70 Opinions of the Attorney General, 151 (Oct. 1985). "Property" interests subject to due process protection are not limited by a few rigid technical forms. Rather, "property"

denotes a broad range of interests that are secured by "existing rules or understandings". Roth, 408 U.S. at 577. A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or a mutually explicit understanding that supports his claim of entitlement to the benefit and that he may invoke at a hearing. Sindermann, 408 U.S. at 601. In Roth, this Court recognized that, to have a property interest in a benefit, a person must have more than a unilateral expectation, but must instead have a legitimate claim of entitlement to it. Roth, 408 U.S. at 577. And, as Justice Stewart pointed out in his decision, "it is the purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance

that must not be arbitrarily undermined". Id. at 577. Justice Stewart, speaking again for the Court in Sindermann, further found that even a non-tenured, non-contractual teacher can have a property interest in his continued employment, of which he cannot be deprived without due process, insofar as that teacher had relied on a provision in the college's Faculty Guide that merely implied a guarantee of continued employment.[2] The respondent in Sindermann had, according to the Court,

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[2] The provision in the guide in question was as follows:

"Teacher Tenure: Odessa College has not tenure system. The Administration of the College wishes the faculty member to feel that he has a permanent tenure as long as his teaching services are satisfactory and as long as he displays cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work." Sindermann, 408 U.S. at 600.

"alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent 'sufficient cause'". Sindermann, 408 U.S. at 602.

The United States Constitution is not a source of property interests, but rather it merely provides procedural protections against the invasion of an acquired property interest. McMurtray v. Holladay, 11 F.3d 499, 502, (5th Cir. 1993), citing U.S. Const. amend. XIV, § 1; Roth, 408 U.S. at 576, 92 S.Ct. at 2708 (1972).

In Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) this Court held that property interests are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state

law. Once bestowed, property interests many not be extinguished by the state without adherence to minimal due process standards. McMurtray, 11 F.3d at 502, citing Boucvalt v. Board of Comm'rs, 798 F.2d 722, 728 (5th Cir. 1986).

In the case at bar, Petitioners have done much more than, as in Sindermann, allege the existence of rules promulgated and fostered by state officials. There is no question as to the existence of Article 64A, §35 or COMAR 06.01.01.44, the statute and regulation through which the Legislature set out the layoff rights of a Merit System employee in Maryland. There is no denying the fact that through State Finance and Procurement Article, §7-213, the legislature limited the ability of the Governor to reduce appropriations, preventing the Governor from reducing the

appropriation for the salary of an employee in the classified or unclassified service except as provided by Merit System law.

These laws and regulations, promulgated by the General Assembly to provide certain protections to classified and unclassified employees of the State of Maryland, are unquestionably relied on by those employees. An individual choosing to work for the State in such a capacity is assured through Article 64A, §35 and COMAR 06.01.01.44, that in the event his position is abolished, he will be laid off, with the right to ninety days notice, a sequence of layoffs, seniority rights based on total service to the State, the right to displace other employees with less seniority within the same job classification, ("bumping rights") and the right to reinstatement based on the level of seniority. There is

no "out" in the law - no exception that alerts employees to the fact that these rights may not be as absolute as they seem. In fact, these layoff rights are more far firmly rooted and more readily relied upon by employees than that provision in the faculty guide that the Sindermann Court found created a protectable property interest. Each Petitioner has an existing, vested property right to ninety days worth of employment, as mandated by COMAR 06.01.01.44, the regulation that implements Article 64A, §35, and that interest in employment is protected under Roth and Sindermann. The right to continued employment via the displacement rights described in §35 if positions are available, and the right to reinstatement, are also rights which Petitioners did not unilaterally expect to be afforded, but

rather ones which were guaranteed by statute.

The doctrine of substantive due process requires legislation to be fair and reasonable in content as well as application, the essence of substantive due process being protection from arbitrary and unreasonable action. Jeffries v. Turkey Run Consolidated School District, 492 F.2d 1, 3 (Ind. 1974). Substantive due process requires legislation to be reasonable in its application and mandates that it not be enforced arbitrarily. To deny appellants their statutorily guaranteed layoff rights without any valid authority would indeed be an arbitrary denial of those rights. The interpretation of the Merit System law urged by the State of Maryland creates a right which is would be arbitrarily afforded to State employees. For example,

if Petitioners were state employees whose positions were eliminated because of a reduction of an appropriation to their agency by the Governor in accordance with §7-213, and the Governor then delegated to that agency the decision as to which positions would be abolished, those employees would be afforded full layoff rights as is required by §7-213(b)(3). However, because in this instance the Governor first requested from the agencies lists of positions to be terminated, and then made the reduction in appropriations, Respondents argue that Petitioners should be denied layoff rights. There seems no relevant distinction between these two scenarios, particularly no distinction which would merit the denial to Petitioners of this vested property right. To interpret the Merit System law and §7-213

differently is to arbitrarily enforce legislation, and is violative of Petitioners' due process rights.

Further, there likewise exists in the applicable laws no exception which would permit the Legislature to circumvent state employees right to layoff procedures in this instance. The express language of Article 64A, §35 is clear - "Employees who are in positions that are to be abolished, discontinued, or vacated, because a change in departmental organization, or through stoppage or lack of work, shall be laid off", and employees who are "laid off" are, under §35 and COMAR, entitle to layoff rights. These rights are explicitly guaranteed. There is no indication in the language of the statute that the General Assembly intended an exception to be had when positions are abolished as result of

legislative action - to infer an exception would ignore another basic rule of statutory interpretation. "The rule of statutory construction is clear that in ascertaining the intention of a legislative body all parts of the statute must be read together and all parts must be reconciled and harmonized if possible. [Citations omitted] All parts of the statute must be read together so that no part becomes superfluous." City of Baltimore v. Bruce, 46 Md. App. 704, 713, 420 A.2d 1272 (1980). By interpreting this statute in a fashion such that these employees, whose positions are to be abolished, have no rights where it so obviously intends to protect them in precisely this situation renders §35(a) superfluous. The Legislature cannot have intended that its express mandate be ignored.

The Court of Appeals of Maryland failed to address this issue in its opinion, and decided the issue under the its ruling in Hopper v. Jones, 178 Md. 429, 13 A.2d 621 (1940), a case which deals with the abolition of a position by the Legislature. As such, it is clearly not applicable to the issues in this case.

The Hopper case deals specifically and exclusively with legislation enacted by the General Assembly. It does not consider action by the Board or by the Governor, nor does the opinion suggest that any other branch of government has law-making powers which would result in actions of that branch being dubbed an operation of law. In Hopper, the Governor, in accordance with the Budget Act of 1939, submitted a budget bill to the General Assembly. Accordingly, the legislature then had the power to

debate, amend, revise, or even reduce the proposed budget before it was eventually passed and made into the law of the State by the General Assembly. When passed by the General Assembly, the budget bill becomes law without any further action of the Governor. Maryland Constitution Article III, §52(6). The Governor's budget formulation prior to the passage of the budget by the General Assembly may be seen as somewhat quasi-legislative. The Governor's actions pursuant to statute, taken after the passage of the budget, are not.

It is clear that the Petitioners have a vested property interest in their layoff rights under Roth and Sindermann, and their rights to due process of law were violated by the State's denial thereof. Therefore, Petitioners respectfully request that this

Honorable Court grant this Petition.

Respectfully Submitted,

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APPENDIX 1

APPENDIX A

Workers' Compensation Commission

v.

Norman Driver and Joan N. Parker

No. 79
September Term, 1992

Michael Adams, et al.,

v.

Department of Public Safety and Correctional Services, et al.,

No. 76
September Term, 1992

In the Court of Appeals of Maryland

Sept. 9, 1994

Before, Chief Judge MURPHY, Judge ELDRIDGE, Judge RODOWSKY, Judge MCAULIFFE*, Judge CHASANOW, Judge KARWACKI, Judge BELL

McAuliffe, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this opinion.

APPENDIX 2

ELDRIDGE, Judge:

The issues in these two cases concern the applicability of the statutory provisions governing the layoff of state employee and the reinstatement rights of laid-off employees.

I.

At the time when the events leading to the present appeals occurred, Maryland Code (1957, 1988 Rep. Vol., 1991 Cum.Supp.), Art. 64A, Section 35, provided in subsection (b) as follows:

> "Section 35. Laying off employees.
>
> * * *
>
> (b) *In general.* - Employees who are in positions that are to be abolished, discontinued, or vacated, because of a change in departmental organization or a stoppage or lack of work, shall be laid off."
>
> * * *

Subsection (c) of Section 35 required

the Secretary of Personnel to promulgate rules and regulations establish procedures for the layoff of state employees and the reinstatement of laid-off employees to comparable occupational positions."** Subsection (d) specific various requirements for the Secretary's rules and regulations, including a provision that a

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Subsection (c) provided as follows:

> "(c) *Secretary to establish procedures.* -- Except for faculty and other unclassified employees of the State institutions of higher education and their governing boards, the Secretary of Personnel shall establish uniform procedures among State agencies, by rule and regulation, for:
>
> (1) The layoff of State employees regardless of employment status; and
>
> (2) The reinstatement of laid-off classified and unclassified State employees to comparable occupational positions in State employment."

laid-off employee may displace another employee with less seniority in the same job classification in the same department.*** Section 35(e) stated that the Secretary of Personnel "shall adopt rules and regulations for reinstatement of unclassified employees that are similar to

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Subsection (d) provided as follows:

> "(d) *Rules and regulations; classified employees.* -- The rules and regulations promulgated by the Secretary pursuant to subsection (c) of this section shall include:
>
> (1) An order of layoff determined by seniority points, including credit for:
>
> (i) Total state service;
>
> (ii) Service within the department where the layoff is to occur; and
>
> (iii) Service in the job classification and its job series, as defined by the Secretary, where the layoff is to occur."

the rules and regulations for reinstatement of classified employees."****

The provisions of Art. 64A, Section 35, originated with Ch. 41 of the Acts of 1920. Subsection (b) has remained almost unchanged since 1920, and the subsection (c) requirement of administrative rules for reinstatement has similarly been in the statute from the beginning. Thus, code (Bagby, 1924), Art. 64A, Section 16, provided as follows:

> "16. An employee in a position that is to be abolished, discontinued, or vacated, because of change in departmental organization, or through stoppage

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As a result of recodification by Ch. 10 of the Acts of 1993, the provisions of former Article 64A, Section 35, are now found in Code (1993), Section 9-501 through 9-506 of the State Personnel and Pensions Article. We shall in this opinion, however, refer to Art. 64A, Section 35, because Section 35 was in effect when the events pertinent to these cases took place.

> or lack of work, shall be laid off and his name placed, in the order provided in the rules of the [State Employment] Commissioner, on the eligible list for the class of the position from which he was laid off."

In *Hopper v. Jones*, 178 Md. 429, 13 A.2d 621 (1940), this Court construed Art. 64A, Section 16, holding that the statute does not apply when the enacted budget bill deleted the appropriation for a specific position. The facts of *Hopper* were as follows. For the fiscal year ending September 30, 1939, the claim staff of the State Accident Fund consisted of five investigators with the following annual salaries: $2,200, $2,200, $2,000, $1,800, and $1,500. The plaintiff Hopper was employed as one of the five investigators, being paid the $1,500 annual salary. The investigator in charge testified that the "'duties that the investigators perform are

all different, one from another.'" 178 Md. at 432, 13 A.2d at 622. The budget bill for the fiscal year 1940, as enacted by the General Assembly in 1939, contained appropriations for only four investigators with annual salaries of $2,200, $2,200, $1,800. See Ch. 284 of the Acts of 1939, at 540-541.***** At the beginning of the new fiscal year, the State Employment Commissioner issued an order "laying off" Hopper because the Legislature made no appropriation for his salary. Hopper then

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***** Actually, the General Assembly itself did not delete the $1,500 position. Instead, under Maryland's executive budget system, the position was deleted by the Governor when he submitted the budget bill for fiscal year 1940. *See* Ch. 284 of the Acts of 1939, at 541, items 10, 13, 14, and 15. Moreover, the $1,500 position was apparently suggested for elimination by the State Accident Fund when it submitted its budget requests to the Governor. *See Records And Briefs In the Court of Appeals of Maryland*, April Term 1940, No. 39, Brief for Appellee at 5.

filed in the Baltimore City Court a petition for a writ of mandamus against the Commissioner, seeking rescission of the lay-off order and reinstatement to one of the investigator positions.

Hopper contended that the Commissioner's action was inconsistent with Art. 64A, Section 16, and with the Commissioner's rules and regulations adopted pursuant to Section 16. According to Hopper, his position as an investigator had been "abolished . . . because of change in departmental organization, or through stoppage or lack of work" within the meaning of Art. 64A, Section 16, and therefore he was entitled to the protection of the merit system rules promulgated by the Commissioner. Under those rules, when positions were abolished, the appointing authority was required to lay off those

employees having the lowest "service ratings." The investigator among the five who had the lowest service rating was investigator Griebel who occupied the $1,800 per year position. Hopper argued that investigator Griebel should be laid off and that Hopper should be reinstated to the $1,800 position. The trial court dismissed Hopper's mandamus petition, and the Court of Appeals affirmed. This Court indicated that, if the purpose of the enacted budget were simply to abolish any one of the five positions, rather than a specific position, and if the choice of which position to abolish were for the agency, then Art. 64A, Section 16, and the rules pursuant to that section, would have been applicable and Hopper would prevail. 178 Md. at 431, 13 A.2d at 622. In the Court's view, however, the purpose of the

enacted budget was to abolish the specific position held by Hopper, because of the different salaries and the designation of the $1,500 position for deletion. 178 Md. at 431-432, 13 A.2d at 622. The court held that Hopper's position was abolished "by operation of law," and that such action was not within Art. 64A, Section 16. The Court stated (178 Md. at 433, 13 A.2d at 623):

> "Our conclusion is that since the Legislature has discontinued the appropriation for an annual salary of $1,500- for an industrial accident investigator, and the appellant was the only investigator receiving that salary, he lost his position by operation of law."

The administrative rules and regulations adopted pursuant to the statute have changed somewhat since the decision in the *Hopper* case. Nevertheless, as previously discussed, the statutory provision construed in *Hopper* remained virtually

unchanged.

II.

As this opinion resolves two separate cases, we shall separately set forth the facts of each case.

A. No. 76, Workers' Compensation Commission v. Parker and Driver

Prior to July 1, 1991, Norman Driver held the position of Chief of the Hearing division for the Workers' Compensation Commission. Also prior to July 1, 1991, Joan Parker held the position of Administrator III with the Commission, at the annual salary of $44,350. She was the only Administrator III at that salary. The budget bill for fiscal year 1992, beginning July 1, 1991, as submitted by the Governor to the General Assembly, retained the positions of both Mr. Driver and Ms. Parker.

During the 1991 legislative session,

the House Appropriations Committee's staff indicated to the Workers' Compensation Commission that the staff intended to recommend the deletion of five "lower level "positions from the portion of the budget applicable to the Commission. The Chairman of the commission responded by opposing the deletion of any positions. Alternatively, the Chairman urged that if Commission positions were to be eliminated by the General Assembly, the Commission would recommend the deletion of Mr. Driver's and Ms. Parker's positions rather than the five lower level positions suggested by the Committee's staff. Subsequently, the House Appropriations Committee and the Senate Budget and Taxation Committee recommended to the entire General Assembly the deletion of Mr. Driver's and Ms. Parker's positions. The General Assembly passed the budget bill

for the fiscal year beginning July 1, 1991, with Mr. Driver's and Ms. Parker's positions abolished.

Both Mr. Driver and Ms. Parker were denied layoff and reinstatement rights pursuant to Art. 64A, Section 35, and the administrative rules promulgated under the statute. The two employees filed grievances and pursued their cases through the State Employees' Grievance Procedure, culminating in hearings before Administrative Law Judges. In both cases, the Administrative Law Judges issued opinions holding that *Hopper v. Jones, supra,* was dispositive. Because each position was specifically eliminated by the budget enacted by the General Assembly, the Administrative Law Judges held that Mr. Driver and Ms. Parker had no layoff and reinstatement rights under Article 64A,

Section 35. Both grievances were "denied and dismissed."

The two employees filed in the Circuit Court for Baltimore County an action for judicial review, and the cases were consolidated for purposes of hearing and decision. Thereafter the circuit court rendered an opinion and order which reversed the administrative decisions and remanded the cases for further proceedings. The circuit court found a critical factual distinction between the present cases and *Hopper v. Jones, supra,* saying:

> "This Court finds an important distinction between the instant case and Hopper. Hopper involves the application of a lay off statute analogous to Article 64, Section 35. The lay off provisions provided for benefits based upon performance evaluation. In Hopper, the legislature was the sole basis for the abolition of the subject employee's position, which was identified by salary, and did not receive appropriation for the

budget year. The employee was deemed to be laid off by 'an act of law and denied lay off benefits.' In Hopper, there were no facts indicating that the department had any input into the legislature's act. . . Under the instant facts, the Workers' Compensation Commission, through its Chairman, Charles Krysiak, recommended that if positions were to be abolished (which the department opposed in general), that not the legislative selection but the department's choice should be followed. The legislative act was not the sole basis for abolition of positions. Hopper is therefore distinguishable on significant facts."

"Our facts involve the implementation by the legislature of the department's choice of which positions to abolish for reasons that Chairman Krysiak explained and are noted several times in the record. The act of the legislature and the department combine to form the basis of the abolition of the loss of the appellants' positions and this is well documented."

* * *

"This Court cannot conclude that the legislature acted independently of the agency

> which, 'in substance,' performed a departmental reorganizing in advance of the Budget Act which 'in form' eliminated the positions. This Court prefers substance over form as this Court is certain the legislature would have intended. The legislature cannot be allowed to perform an 'end run' around the statute which it enacted to confer benefits on senior employees which the legislature has expressed its intention to support."

The circuit court went on to hold that, if Art. 64A, Section 35, were interpreted as inapplicable in this situation, such interpretation would result "in denying similarly situated groups of employees the equal protection of the law without a rational basis in contravention of Article 24 of the Maryland [Declaration of Rights] and the 14th Amendment of the United States Constitution . . . ." the circuit court concluded that, because of the Commission's recommendation to the House Appropriations

Committee, "the positions of appellants were abolished by department organization, and the appellants are entitled to be laid off under Art. 64A, Section 35."

The Commission took an appeal to the Court of Special Appeals. Prior to any further proceedings in the intermediate appellate court, the parties filed in this Court a joint petition for a writ of certiorari which we granted.

In this Court, the thrust of the two employees' argument is that *Hopper v. Jones, supra,* is not controlling because today, under Art. 64A, Section 35(d), and the administrative rules and regulations, the layoff and reinstatement rights of employees are different than they were when *Hopper* was decided. Mr. Driver and Ms. Parker also argue that, to deny them layoff and reinstatement rights under Art. 64A,

Section 35, while granting such rights to employees whose jobs are abolished by departmental reorganizations, would violate constitutional equal protection principles.

B. No. 76, Adams et al. v. Department of Public Safety and Correctional Services, et al.

Code (1985, 1988 Repl. Vol.), Section 7-213 of the State Finance and Procurement Article authorizes the Governor, with the approval of the Board of Public Works, to reduce, by not more than 25%, any appropriation that the Governor deems unnecessary.[*****] For a discussion of

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[*****] The statute reads as follows:

> **"Section 7-213. Reductions.**
>
> (a) *Authorized.* - Except as provided in subsection (b) of this section, with the approval of the Board of Public Works, the Governor may reduce, by not more than 25%, any appropriation that the Governor considers unnecessary.

(continued...)

the history and purpose of this statute, see *Judy v. Schaefer*, 331 Md. 239, 627 A.2d 1039 (1993).

On October 23, 1991, because of a shortfall in state government revenues and to avoid a deficit, the Governor, with the approval of the Board of Public Works, signed orders pursuant to Section 7-213 to reduce appropriations. Included among the

---

"...(...continued)

(b) *Exclusions*. - (1) The Governor may not reduce an appropriation to the Legislative Branch or the Judicial Branch of the State government.

(2) The Governor may not reduce an appropriation for:

(i) payment of the principal of or interest on the State debt;

(ii) public schools; or

(iii) the salary of a public officer, during the term of office.

(3) Except as provided in the Merit System Law, the Governor may not reduce an appropriation for the salary of an employee in the classified or unclassified service."

reductions was the total abolition of more than 1500 employee positions in several state departments and agencies. Each position abolished was individually identified by PIN number (personal identification number).

The selection of the positions to be abolished had been based on the recommendations of the departments and agencies involved. Thus, when the Governor reached the conclusion that the abolition of state employment positions was necessary because of the fiscal emergency, the Secretary of Budget and Fiscal Planning, acting upon the Governor's direction, requested various state departments and agencies to submit recommendations of specific positions to be abolished, listed by PIN number, class code and position title. The Governor's order abolished the

positions recommended by the departments and agencies.

Michael Adams and 32 other persons involved in this case had been employed in various state departments and agencies. Their positions had been specifically abolished by the Governor's order of October 23, 1991, and they were denied layoff and reinstatement rights pursuant to Art. 64A, Section 35. They filed grievances, took the appropriate actions under the State Employees' Grievance Procedures, and finally had a hearing, extending over several days, before an Administrative Law Judge. Before the Administrative Law Judge, the grievants were "basically not contesting the Governor's action or the approval of the Board of Public Works." Their position was essentially that, once the Governor decided

upon the abolition of the positions, the provisions of Art. 64A, Section 35, and the administrative rules pursuant thereto, should determine which employees actually lost their jobs. The various state departments and agencies, represented by the Attorney General, argued that *Hopper v. Jones, supra*, was controlling.

The Administrative Law Judge, in an extensive opinion, decided that the "[g]rievants are entitled to rights afforded under the layoff statute, Md. Ann. Code, Art. 64A, Section 35." Like the circuit court in the *Driver and Parker* cases, the Administrative Law Judge in *Adams* placed much weight on the fact that the recommendation of the agencies were accepted, stating:

> "The State, on the other hand, contends that it was the appropriation reduction pursuant to Section 7-213 which mandated

the abolition of jobs. The State's position is that Section 7-213 is not a personnel rule, regulation or policy over which 'management' had control. While it is true that the appropriation reduction was predicated on Section 7-213, it is equally apparent that the various agencies, upon request, submitted the information to the Governor identifying which jobs had been selected for abolition. It was this submission of information which dictated which jobs were abolished. The Governor and the Board of Public Works did not randomly select Position Identification Numbers (PINs) but were supplied that information from the agencies. Since it was that information and that information alone which dictated which positions were abolished, it must be concluded that management exercised control over that decision. Management may not have had control over the fact that such reductions were necessary but they certainly maintained total control over selecting which positions were ultimately abolished.

"In light of the above, the response to the questions "Who did wrong?" must be "The various appointing authorities." As stated earlier, the Grievants' cause of complaint is aimed

> directly at the actions of the appointing authorities, not that of the Governor or Board of Public Works."

The Administrative Law Judge distinguished *Hopper v. Jones, supra,* as follows:

> "Thus, Section 7-213, as did its predecessor, authorizes the Governor to reduce appropriations after the enactment of the budget bill. Such action by the Governor with the Board of Public Works' approval is not comparable to what occurred in *Hopper*. In *Hopper*, the Governor's action or inaction eventually became law. In the instant grievances, the reduction in appropriation did not create or change any laws. Neither is the action an amendment to the budget as defined in Section 7-209.
>
> The Governor with the approval of the Board of Public Works administered a law, Section 7-213. The result was a reduction in appropriations which limited the spending of specified agencies. Such action was a ministerial function, not a legislative act.
>
> "Thus, by examining the function being performed by the Governor and Board of Public Works as it relates to Section 7-

> 213, it is clear that such action is executive, not legislative. Accordingly, any results from exercising that function, such as job abolishment, are not legislative in nature. If the results are not legislative, then it cannot be concluded that the job abolitions were by operation of law."

The various state departments and agencies filed an action for judicial review in the Circuit Court for Anne Arundel County. The circuit court reversed, holding that the positions were abolished by operation of law, that *Hopper v. Jones* was controlling, and that, therefore, the employees were not entitled to layoff and reinstatement rights under Art. 64A, Section 35.

The employees noted an appeal to the Court of Special Appeals. Prior to the filing of briefs and oral argument in the intermediate appellate court, they filed in this Court a petition for a writ of

certiorari which we granted. In arguing that they were entitled to layoff and reinstatement rights under Art. 64A, Section 35, and that the Administrative Law Judge properly accorded them relief in a grievance proceeding, the employees place much weight upon the fact that the positions abolished were those recommended for abolition by the heads of various state departments and agencies. They assert that "[i]t was the management of the various agencies who made the decisions as to which positions would be abolished" (appellants' brief at 6) and that the dispositive choices were made by those at the agency level regarding which employees would be laid off by the [Governor and the] Board on October 23" (appellants' brief at 8). The employees go on to argue that "[t]here is no express or implied exception in Section

35 which eliminates its protection when positions are abolished by agencies under the direction of the Governor and the Board of Public Works" (*id.* at 13). The holding in *Hopper v. Jones*, according to the employees, is limited to "legislative actions." They state that, although the "Governor's budget formulation prior to the passage of the budget by the General Assembly may be seen as somewhat quasi-legislative," nevertheless the "Governor's actions pursuant to statute, taken after the passage of the budget, are not" (*id.* at 19).

III.

The circuit court in *Driver and Parker*, and both the Administrative Law Judge and the employees in *Adams*, have viewed the abolition of the various positions involved largely as actions taken

by the administrative departments and agencies rather than actions taken by the General Assembly in *Driver and Parker* and the Governor in *Adams*. This is because the departments and agencies made recommendations to the decision makers which the latter decided to follow.

In our view, however, the decision to delete from the budget bill the appropriations for Mr. Driver's and Ms. Parker's positions must be treated wholly as the decision of the General Assembly. Similarly, the decision to abolish the positions involved in the *Adams* case was entirely that of the Governor, approved by the Board of Public Works. That the Legislature or the Governor, in performing their official functions under the law, may have been influenced or motivated, in whole or in part, by recommendations of agencies

or of other entities or persons, is irrelevant.

It is well-settled that when the judiciary reviews a statute or other governmental enactment, either for validity or to determine the legal effect of the enactment in a particular situation, the judiciary is ordinarily not concerned with whatever may have motivated the legislative body or other governmental actor. Long ago, in *Mayor &c., of Balto. v. State*, 15 Md. 376, 461 (1959), this Court stated:

> "Hence we see that while the motives of the Legislature can have no effect upon the efficiency of the laws, neither can they be regarded by the judiciary when testing their power to pass them."

See also 15 Md. at 482.

The Supreme Court of the United States in *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220, 224, 69 S.Ct. 550, 552, 93

L.Ed. 632, 636 (1949), with respect to the argument that recommendations from the "insurance lobby" influenced the South Carolina legislature to enact the statute there involved, stated:

> "But a judiciary must judge by results, not by the varied factors which may have determined legislators' votes. We cannot undertake a search for motive . . ."

Therefore, except to the extent that a governmental body's motive may cast light upon the meaning of its enactment, its motive is ordinarily not pertinent in applying that enactment. That the General Assembly and the Governor may have been motivated by recommendations from state agencies can have no relevance in determining the effects of their official actions.

Under Article III, Section 52, of the Maryland Constitution, the General

Assembly, and only the General Assembly, can enact the annual budget for the State. Under Section 7-213 of the State Finance and Procurement Article, the Governor, and only the Governor, can reduce appropriations in the budget up to 25% after the budget has been enacted. These official actions did not become the actions of state agencies because the General Assembly and the Governor received recommendations from those agencies and decided to follow them. The making of recommendations did not convert the state agencies into decision makers. *See, e.g., People of Virgin Islands v. Price*, 181 F.2d 394, 396 (3d Cir. 1950) ("To recommend is to present as one's advice . . . It ordinarily involves the idea that another has the final decision"); *Fletcher v. Porter*,, 203 Cal.App.2d 313, 317, 21

Cal.Rptr. 454, 454 (1962) ("To recommend does not mean to bind"); *Mora county Board of Education v. Valdez*, 61 N.M. 361, 366, 300 P.2d 943, 946 (1956) ("A recommendation is not an act of final decisive power -- it merely suggests the desirability of a course of action to be followed by another"). *See also Duffy v. Conaway*, 295 Md. 242, 259, 261-262, 455 A.2d 955, 963-965 (1983).

Since Mr. Driver's and Ms. Parker's positions were abolished by the enacted budget bill, and not by the agency for which they were employed, our decision in *Hopper v. Jones* is clearly dispositive in their cases.*******

It is noteworthy that the agency's recommendation in the *Hopper* case apparently contributed to the final decision to as great a degree as the agency's recommendation in *Driver and Parker*. *See* n. 4, supra.

Mr. Driver and Ms. Parker suggest that *Hopper* is distinguishable because, today, employees have somewhat different layoff and reinstatement rights than they did at the time of *Hopper*. Today layoff and reinstatement rights largely depend upon seniority, whereas at the time of *Hopper* they depended upon "service ratings." Nonetheless, as earlier discussed, the key statutory provision did not change since the *Hopper* case. Whatever the layoff and reinstatement rights may be under Article 64A, Section 35(d), and the administrative rules promulgated thereunder, those rights only come into being when employees "are in positions that are to be abolished, discontinued, or vacated, because of a change in departmental organization" within the meaning of Section 35(b). This language in Section 35(b) is identical to

the language of former Art. 64A, Section 16, which was construed in *Hopper* The *Hopper* opinion indicated that the language encompassed the abolition of a position by the agency itself or by the budget process when jobs were reduced without targeting specific positions, but that the language did not cover the total removal of funding for the specific position in the state budget. This interpretation of the language is controlling under the principle of stare decisis.

Moreover, the *Driver and Parker* cases present circumstances under which a court should rarely depart form the rule of stare decisis. The provisions of former Article 64A, Section 16, and Article 64A, Section 35, have been reenacted with amendments on several occasions since this Court's opinion in *Hopper v. Jones*. Nevertheless,

from the time of *Hopper* through the period when the present cases arose, the General Assembly did not change the particular language construed in *Hopper*. In this situation, a court should be most reluctant to overrule its prior interpretation of the statutory language. We explained in *Williams v. State*, 292 Md. 201, 210, 438 A.2d 1301, 1305 (1981):

> "The General Assembly is presumed to be aware of this Court's interpretation of its enactments and, if such interpretation is not legislatively overturned, to have acquiesced in that interpretation. *Harden v. Mass Transit Adm.*, 277 md. 399, 406, 354 A.2d 817 (1976). This presumption is particularly strong whenever, after statutory language has been interpreted by this Court, the Legislature re-enacts the statute without changing in substance the language at issue. *Harbor Island Marina v. Calvert Co.*, 286 Md. 303, 322-323, 407 A.2d 738 (1979); *Director v. Cash*, 269 Md. 331, 345, 305 A.2d 833 (1973) *cert. denied sub nom. Vucci v. Boslow, Institution Director*, 414

> U.S. 1136, 94 S.Ct. 881, 38 L.Ed.2d 762 (1974); *Macke Co. v. St. Dep't of Assess. & T.*, 264 Md. 121, 132-133, 285 A.2d 593 (1972); *Stack v. Marney*, 252 Md. 43, 49, 2487 A.2d 880 (1969). Under these circumstances, it is particularly inappropriate to depart from the principle of stare decisis and overrule our prior interpretation of the statute. *White v. Prince George's Co.*, 282 Md. 641, 657-658, 387 A.2d 260 (1978). *See also Flood v. Kuhn*, 407 U.S. 258, 92 S.Ct. 2099, 32 Led.2d 728 (1972)."

See, e.g., United States v. Streidel, 329 Md. 533, 551 n. 12, 620 A.2d 905, 914 n. 12 (1993); *Forbes v. State*, 324 Md. 335, 342, 597 A.2d 427, 431 (1991); *Nationwide v. USF&G*, 314 Md. 131, 143, 550 A.2d 69, 75 (1988); *Farmers & Merchants Bank v. Schlossberg*, 306 Md. 48, 60, 507 A.2d 172, 178 (1986); *Forbes v. State*, 304 Md. 439, 479-480 n. 20, 499 A.2d 1236, 1257 n.20 (1985), *cert. denied*, 478 U.S. 1010, 106 St.Ct. 3310, 92 L.ed.2d 723 (1986); *Calhoun*

v. State, 299 Md. 1, 11, 472 A.2d 436, 441 (1984).

The *Adams* case, of course, is somewhat different from *Hopper*. Whereas in *Hopper* the Governor made the decision to delete the annual appropriation for Mr. Hopper's position prior to submitting the budget bill to the General Assembly, and thus under Maryland's executive budget system the appropriation was deleted by the enacted budget bill, in *Adams* the governor made the decisions to delete the annual appropriations for the positions after the budget bill was passed and pursuant to Section 7-213 of the State Finance and Procurement Article.

Nonetheless, as recently discussed in *Judy v. Schaefer, supra*, 331 Md. at 258-261, 269, 627 A.2d at 1049-1050, Section 7-213 was enacted pursuant to the

constitutional budget provisions, Article III, Section 52, of the Constitution, and particularly Section 52(13). It is a "necessary and proper" statute "for the [budget] process to function." *Judy*, 331 Md. at 258, 627 A.2d at 1049. In *Judy*, this Court specifically analogized the Governor's authority under 7-213 to his authority under Article III, Section 52, to reduce appropriations upon the submission of the budget bill, saying (331 Md. at 259-260, 627 A.2d at 1049-1050):

> "The authority given to the Governor in Section 7-213 corresponds to the power vested in the Governor by Art. III, Section 52. Section 7-213 merely allows the Governor to accomplish at the end of the budget process what he is required to do when he submits his initial budget. If the revenue estimates for FY 1993 had been accurate at the time the budget bill was being prepared for submission to the General Assembly, the Governor would have been required to impose the reductions at that juncture. The

> revenue estimates for FY 1993 turned out to be inaccurate after the enactment of the budget bill, just as they turned out to be inaccurate in the 1930's. The General Assembly, well aware of the problem in the 1930's and the possibility of its recurrence, enacted Section 7-213 in 1939 in order to forestall the accumulation of deficits in subsequent fiscal years.
>
> Section 7-213 comports with Art. III, Section 52, because the statute recognizes and perpetuates the preeminent role of the Governor in the budget process . . . . Furthermore, because Section 7-213 furthers the requirement of maintaining a balanced budget throughout the fiscal year, it is precisely the type of legislation which the framers of Art. III, Section 52, contemplated."

Later we reiterated that "the authority of the Governor in Section 7-213 mirrors the authority of the Governor in Section 52 of Art. III" (331 Md. at 261, 6276 A.2d at 1050) and that (331 Md. at 269, 627 A.2d at 1054-1055)

> "[s]ection 7-213 provides a

> mechanism by which the Governor can fulfill his constitutional obligation to maintain a balanced budget and to avoid a deficit when the estimated revenues used in the budget bill are too high. the power of the Governor to reduce appropriations under 7-213 is consistent with the power of the Governor in the budgetary process, and, as proven in 1933 and 1935 as well as in the 1990's, is "necessary . . . to carry out" the balanced budget requirement of Art. III, sec. 52(5a)."

In both *Adams* and *Hopper* the appropriations for the positions were abolished by the Governor, acting pursuant to the constitutional budget process. Under Maryland's executive budget system, the Governor's decisions in both cases were legislative-type acts. The positions were not abolished by the agencies themselves, as part of a departmental reorganization by the agencies. Instead, in both cases, the annual budget process, accomplished by the Governor and General Assembly together,

operated to delete the funding for specific positions. Consequently, we believe that the *Hopper* opinion is controlling in the *Adams* case.

Finally, we do not believe that there is any merit in the equal protection of the laws argument raised in the *Driver and Parker* cases. The Legislature may decide to grant layoff and reinstatement rights under certain circumstances without having to grant the same rights under all circumstances. *See, U.S.R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 177, 101 S.Ct. 453, 460, 66 L.Ed.2d 368, 377 (1980) ("Because Congress could have eliminated windfall benefits for all classes of employees, it is not constitutionally impermissible for Congress to have drawn lines between groups of employees for the purpose of phasing out those benefits").

See also Hargrove v. Board of Trustees, 310 Md. 406, 424-425, 529 A.2d 1372, 1381 (1987), *cert denied*, 484 U.S. 1027, 108 S.Ct. 753, 98 L.Ed.2d 766 (1988). It is not irrational to treat differently the situation where the funding for a specific position is abolished by the Governor and General Assembly through the budget process.*******

Subsequent to the events in these cases, the General Assembly, by Ch. 62 of the Acts of 1992, Section 6, at 1150-1151, "[t]o clarify interpretation of existing law," expressly stated that the provisions of Art. 64A, Section 35, were inapplicable when positions are deleted by the enacted budget bill or by the Governor's action under Section 7-213 of the State Finance and Procurement Article. *See also* Code (1993), Section 9-501(c) of the State Personnel and Pensions Article.

The parties have in their briefs devoted considerable space to the effect, if any, the new statute may have on the issues here. We need not explore this matter, however, as we have decided the present cases without regard to the new

(continued...)

APPENDIX B

State of Maryland Department of Public Safety and Correctional Services, et al.,
Appellants

v.

Michael Adams, et al.,
Appellees

Case No. C-92-03264AA

In the Circuit Court for Anne Arundel County

June 8, 1992

OPINION AND ORDER

The Appellees filed suit before the Office of Administrative Hearings ("OAH") questioning the authority of the State of Maryland to terminate employees without the benefit of the rights characterized in Md. Ann. Code Art. 64A, Section 35 and COMAR

.....(...continued)
statutory provisions.

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06.01.01.44. An order rendered on March 12, 1992 held that the OAH maintained jurisdiction over the grievance and that the employees were entitled to rights afforded under the state layoff statute. The State of Maryland filed an appeal from that order to this Court. The Appellants' contend that the Order of the OAH is unconstitutional, exceeds the statutory authority and jurisdiction of OAH and is erroneous as a matter of law. This Court agrees.

PROCEDURAL HISTORY

Pursuant to the Maryland State Finance and Procurement Article, Section 7-213, and with the approval of the Legislature under Senate Bill 34, the grievant's jobs were abolished as a result of the October 23, 1991 budget reduction by the governor, with the approval of the Board of Public Works.

Included in the budget reduction was the abolition of 1500 State positions, among the positions lost were those of the Appellees. As a result of these layoffs, the individuals filed grievances before the OAH alleging that their rights were denied under Md. Ann. Code art. 64A, Section 35.

INITIAL CONSIDERATIONS

Before discussing each of the Appellant's claims, the Court must first look to the applicable laws of this case. The standard of review by this Court of a decision of an administrative agency is clear and well known. Reviewing courts cannot substitute their judgment for that of the agency. Judicial review of an administrative order must be based on the agency's findings and may only be upheld "for the reasons stated by the agency." United Steelworkers v. Bethlehem Steel, 298

Md. 665, 679 (1984). After reviewing the agency's findings and rationale, Maryland law requires that the appellate court affirm any decision which is supported by substantial evidence and is not arbitrary or capricious. Motor Vehicle Administration v. Lindsay, 309 Md. 556 (1987).

In applying the substantial evidence test, a reviewing Court must consider the agency decision prima facie correct, deferring to the agency's presumed special expertise. State Commission on Human Relations v. Washington County Community Action Council Inc., 59 Md. App. 451 (1984). Specifically, the reviewing court must determine whether reasoning minds could have reached a different conclusion based upon all the evidence before the agency, analogous to the "clearly erroneous" standard under Maryland Rules

886 and 1086, and whether the conclusion is based upon the proper construction of the law. Frank v. Baltimore County, 284 Md. 655 (1979). If the reviewing Court determines that the conclusions of the agency are supported by substantial evidence and that the agency applied the law, the Court has no power to reject that conclusion. Commissioner v. Cason, 34 Md. App. 487 (1977). With the guidance of the foregoing principles, the Court turns now to the issues raised by the Appellant.

OPINION

The issue facing the Court is whether the Merit System layoff provisions of Article 64A, Section 35(b) and COMAR 06.01.01.44 apply when State employees jobs were abolished as a result of a budget reduction in October, 1991 by the Governor, with the approval of the Board of Public

Works.

Initially, the Appellants claim that, in this particular situation, the abolition of jobs under the Governor's authority was not a grievance within the meaning of Article 64A, Section 52(b). Consequently, OAH had no jurisdiction to hear this matter when the decision to layoff employees was mandated by the Governor, a State official. In response, the Appellees claim the Governor's actions in eliminating the positions were the actions of an "employer" as defined in Article 64A, Section 52(b).

Article 64A, Section 52(b) defines "Grievance:"

> "...means any cause of complaint unless otherwise provided for under this article arising between an employee and his employer over the interpretation and application of State employee personnel rules, regulations, policies or any other rules, regulations, policies or any other rules, regulations or

policies over which management has control."

The Appellants presents definitive case authority to support their claim that OAH had no jurisdiction over this matter. The Appellants support this argument that the Governor's actions fits within the above definition of "grievance" as a result of Md. St. Govt. Code Section 3-302, which states: "The Governor is the head of the Executive Branch of the State government and, except as otherwise provided by law, shall supervise and direct the officers and units in that Branch." Logically, the Appellees claim that since the Governor is the "ultimate supervisor," he fits into a definition of "employer" within the meaning of Article 64A, Section 52(b). This Court cannot agree.

This Court holds that OAH lacked jurisdiction to review this budget decision

of the Governor. The language in a decision rendered by the Attorney General's Office cannot be refuted:

> "Neither the Budget Bill nor the authority granted by it is a rule, regulation, or policy over which "management" has control. Obviously, the term "management" in Section 52(b) refers to the various levels of management of the employing agency through which the employee presses his or her grievance, described in Article 64A, Section 54, and not to State officials outside the employing agency." 64 Opinions of the Attorney General, 146 (1979).

However, assuming OAH had maintained jurisdiction, an analysis of the pertinent issue necessarily begins by addressing the specific action the Governor took in reducing appropriations. The Appellees argue that the elimination of the rights of State employees by the Governor under 7-213 and Article 64A, Section 35 consisted of a

legislative act and were thus illegal. By contrast, the Appellants claim these actions wee legislative in nature; consequently, these positions were abolished by operation of law. The Appellants base this conclusion on three Opinions: Hopper v. Jones, 178 Md. 429 (1940); 75 Opinions of the Attorney General 90-056 (1990) and 76 Opinions of the Attorney General 91-041 (1991).

In Hopper, when the budget bill was enacted by the General Assembly there was no funding available for a State employee's position. The Court of Appeals held that the employee lost his position as a result of an operation of law; therefore, the employee was not entitled to layoff rights. The Appellees claim that Hopper does not apply to the present situation. The appellees argue that the Court in Hopper

concluded that layoff rights would apply if it could not have been determined which positions were eliminated by the Legislature. However, this argument can not sustain their position since the positions abolished were specifically identified.

The Appellants also rely on two Attorney General positions, both addressing the relevant issue of the Merit System Law and the application of layoff provisions:

> "It is our opinion that when the funding for a position is eliminated under the direct or delegated authority of Article III, Section 52 of the Constitution, the action is a legislative act with the force of law. If the funds in question are earmarked for an identifiable position, that position is terminated by operation of law and no layoff subject to Article 64A, Section 35 has occurred." 76 Opinion of the Attorney General, _____ (1991) Opinion No. 91-041.

> "Article 41A, Section 35, is inapplicable to employees released

> because no appropriations are available to pay salaries. In making layoffs for this reason, an appointing authority must of course avoid arbitrary or otherwise unlawful choices among similarly situated employees. However, an appointing authority is not legally required to apply Article 64A, Section 35 and the regulations implementing it if budgeted funds are simply no longer available to fund a position." 75 Opinion of the Attorney General (199) Opinion No. 90-056.

Conclusively, since the positions abolished were specifically identified, no layoff rights applied; consequently, the jobs were abolished by operation of law.

Nonetheless, since the basis of this action is based upon the denial of Merits System lay off rights under Maryland law, the Court must examine the effect of the legislative action by the Governor on the rights described in Md. Ann. Code, Art. 64A, Section 35 and COMAR 06.01.01.44. The rights of employment conferred in Section 35 do not apply to positions abolished by

operation of law. Hopper, at 430.

Additionally, the Appellees rely on State Finance and Procurement Article, Section 7-213, which allows the Governor, with the approval of the Board of Public Works, to reduce appropriations. Specifically, Section (3) of 7-213 declares; "Except as provided in the Merit System law, the Governor may not reduce an appropriation for the salary of an employee in the classified or unclassified service." The Appellees analogize "salary" with "positions," claiming that this section specifically prohibits the Governor from implementing any reductions in appropriations. However, this Court finds no merit in the Appellee's argument. The terms "salary" and "positions" have two different meanings; consequently, this section cannot apply. "Salary" is defined

as "a reward or recompense for services performed." Black's Law Dictionary (4th ed. 1968). By contrast, "position" is defined as "a relative place, situation, or standing; social or official rank or status; employment, job." Webster's New Collegiate Dictionary (5th ed. 1980).

In conclusion, this Court finds that the decision rendered by OAH was based upon an erroneous application of the law to the facts.

ORDER

It is, therefore, this 8th day of June, 1992, by the Circuit Court for Anne Arundel County,

ORDERED, that the Judgment of the Office of Administrative Hearings be REVERSED, and this case is REMANDED to the OAH for further proceedings consistent with this opinion.

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APPENDIX 57

APPENDIX C

In Re: Job Abolitions

Before Administrative Law Judge Mackel

Office of Administrative Hearings

No. 91-DOP-PI-11-022554, 91-DOP-PSCS-11-2476, 91-DOP-MCAC-11-021265, 92-DOP-ECI-11-000390, 91-DOP-MCHH-11-021268, 91-DOP-MPRS-11-021859, 91-DOP-RCI-11-021254, 91-DOP-DEAF-11-02418, 91-DOP-RCI-11-021263, 91-DOP-MSP-11-024102, 91-DOP-MSP-11-024103, 91-DOP-MCTC-11-024138, 91-DOP-MSP-11-021091, 91-DOP-PSCS-11-2476, 91-DOP-DJS-11-021269, 92-DOP-DLR-11-00747.

March 12, 1992

APPENDIX 58

FINAL ORDER

For all of the reason set forth in the Memorandum Order on Motion to Dismiss dated February 25, 1992, I conclude as a matter of law that:

1. The cause of complaint presented by these grievances is one within the jurisdiction of the Office of Administrative Hearings; and that

2. The Grievant's positions were not abolished by operation of law.

Therefore, Grievants are entitled to rights afforded under the layoff statute, Md. Ann. Code., Art. 64A, Section 35 (1988).

It is hereby ORDERED that agency management shall apply the provisions of the layoff statute to each of the individual Grievants referenced above, and

that this Order is a Final Order resolving the issues presented to this Office in these individual cases specifically identified above.

It is further ORDERED that agency management's application of the provisions of the layoff statute to each of the individual grievants above is hereby STAYED pending final resolution of respondents' appeal in these cases.

APPENDIX 60

APPENDIX D

In The

Court of Appeals of Maryland

September Term, 1992

Michael Adams, et al.,
Appellants,

v.

State of Maryland
Department of Public Safety and
Correctional Services, et al.,
Appellees

Brief of Appellant

Dated: October 19, 1992

APPENDIX 61

STATEMENT OF THE CASE

Appellants, all employees of the State of Maryland whose positions were abolished as a result of action by the Governor and the Board of Public Works on October 23, 1991, filed grievances complaining that their positions had been abolished in violation of Code of Maryland Regulations 06.01.01.44 and the Merit System Law, Maryland Annotated Code, Article 64A, §35. The Appellants requested to be reinstated and provided all the provisions of the Merit System Law and COMAR 06.01.01.44. Appellees filed a Motion to Dismiss pursuant to COMAR 06.01.03.15.

On February 25, 1992, Administrative Law Judge Sondra L. Mackel denied Appellees Motion to Dismiss. Judge

Mackel found that, as a matter of law, the grievances presented by the Appellants are within the jurisdiction of the Office of Administrative Hearings, and that the positions of Appellants were not, as Appellees asserted, abolished by operation of law. Judge Mackel found that Appellants are entitled to rights afforded under the layoff statute, Maryland Annotated Code, Article 64A, §35 (1988), and in a final order dated March 12, 1992, directed the various state agencies to apply the layoff regulation to the Appellants.

On March 13, 1992, Appellees noted an appeal to the Circuit Court for Anne Arundel County, and legal argument was heard in the Circuit Court for Anne Arundel County before the Honorable Raymond G. Thieme, Jr. on May 12, 1992. On June 8, 1992, Judge Thieme issued an Order and

Opinion reversing the Judgment of the Office of Administrative Hearings.

An Appeal was noted to the Court of Special Appeals on July 7, 1992. On July 16, 1992, a Petition for a Writ of Certiorari to the Court of Appeals was filed by Appellants, and Appellees in their Answer to the Petition for Certiorari concurred in that request. This Court granted review on September 21, 1992.

QUESTIONS PRESENTED

1. Whether the decisions by the management level authorities regarding both which positions would be terminated and the effective dates of those terminations demonstrate management control over those decisions, resulting in a "grievance" within the meaning of Article 64A, §52(b) and within the jurisdiction of the Office

of Administrative Hearings.

2. Whether the Governor's exercise of §7-213 of the State Finance and Procurement Article to reduce unnecessary appropriations was an executive function, rather than a legislative one, making the layoff provisions applicable to the positions which were abolished.

3. Whether the rights given the Appellants under the Merit System are property interests, the deprivation of which by any branch of the government violates the prohibition against a taking of property without due process of law found in the United States Constitution and the Maryland Declaration of Rights.

4. Whether H.B. 458 purporting to give the Governor retroactive authority to abolish positions without heed to statutorily mandated layoff rights violates

federal and state due process requirement precluding the taking of vested property rights.

STATEMENT OF FACTS

Each of the Appellants was employed with the State of Maryland in classified, unclassified and contract positions at the time their jobs were abolished. The abolition of the positions was the result of a series of actions of the various state agencies in which the Appellants were employed, those agencies taking the actions under the direction of the Governor and the Board of Public Works.

On October 2, 1991, the Governor and the Board of Public Works ("the Board") met and discussed Miscellaneous Item 12-GM providing for "positions to be abolished by department and independent

agency." (E.74) This action was approved by the Board. Subsequently, Department of Budget and Fiscal Planning Secretary Charles Benton requested that various state agencies provide him with a list of positions to be abolished by the Board at its October 23, 1991 meeting. The agencies responded, including the Office of the Attorney General, the Office of the State Prosecutor, the Maryland State Archives, the Military Department, the Commission on Human Relation, among others. In response to Secretary Benton's request the various management level authorities listed by PIN number (personal identification number), class code, and position title, positions to be abolished by the Board at its October 23, 1991 meeting. Each Agency also provided proposed termination dates.

At the October 23, 1991 meeting

the Board passed Miscellaneous Item 2-S which provided "the positions described in the attached documents shall be abolished effective at the close of business on the dates identified in the attached documents" (E.148). The documents referred to are the responses from the various agencies to Secretary Benton indicating the positions the different agencies recommended be abolished and the dates for termination. These specific jobs were subsequently abolished on the dates selected by the agencies and identified on the attachments (E.154).

Each of the Appellants lost their jobs by virtue of the decisions of the various management level authorities and the October 23, 1991 Board action. All were terminated by January 1, 1992, and none were given the benefit of the rights

described in Maryland Annotated Code Article 64A, §35 (1988) and COMAR 06.01.01.44 for employees in positions that are to be abolished. Those rights include a sequence of layoff based on position type (temporary, contractual, probationary, permanent) the right to displace employees with less seniority and ninety-days notice prior to termination.

ARGUMENT

A. The Office of Administrative Hearings has jurisdiction to hear these grievances because control over which positions were to be terminated and when remained with the management authorities, and because the Governor had no authority to circumvent the clear language of the applicable statute and regulation.

The Office of Administrative Hearings is designated by Maryland State Gov't Code Annotated 9-1601 to adjudicate contested cases regarding certain non-exempted agencies. A "grievance" is

defined in Maryland Annotated Code, Article 64A, §52(b) (1988) as follows:

> ...any cause of complaint unless otherwise provided for under this article arising between an employee and his employer over the interpretation and application of State employee personnel rules, regulations, or policies or any other rules, regulations, or policies over which **management** has control [emphasis supplied].

1. The failure to implement layoff rights occurred at the agency level, and the decision of which positions were to be abolished was one over which management exercised control.

Appellants were all employees within the meaning of the Merit System Law. Appropriations existed for their positions for Fiscal Year 1992. At the October 2, 1991 meeting of the Board of Public works, Miscellaneous Item 12-GM, which provided for "positions to be abolished by

department and independent agency" was approved. (E.74) Toward that end, Secretary Benton requested that the various state agencies provide him with a list of positions to be abolished by the Board at its October 23, 1991 meeting.

The agencies responded. At the October 23 meeting of the Board, General Miscellaneous Item 2-S was approved (E.148), providing that "the positions described in the attached documents shall be abolished effective at the close of business of the date identified in the attached documents". The "attached documents" to which the Item referred were memoranda from the various state agencies from which had been solicited lists of positions to be terminated. The agencies provided the Board with the position titles and PIN numbers of the various positions

which the agencies' themselves had decided should be abolished. The agencies also decided the dates upon which the terminations were to become effective. The specific jobs were abolished on the dates identified on the attachments, and those positions and dates were wholly chosen by the various agencies. The termination dates selected by the management of the agencies varied greatly; for example:

Office of the Attorney General - Admin. Ofc. III - 11-1-91
Department of General Services - Administrator III 11-4-91
Maryland Veterans Commission - Admin. Aide 11-5-91
Department of Juvenile Services - Regional Supervisor 12-31-91
Maryland State Archives - Archivist IV 1-1-92
Commission on Human Relations - Office Secretary III 1-1-92
Department of Public Safety & Correctional Services - Office Sec. I 1-31-92
(E.154,165,160,189,157,159,175)

It was the management of the various agencies who made the decisions as

to which positions would be abolished, and it was the management who decided the date on which the terminations would take place, the effect of which was to give some employees as much as 90 days more employment before termination than others. At the October 2, 1991 meeting of the Board, Secretary Benton admitted that "[a]s far as personnel is concerned, we pretty much have been guided by the recommendations of the various departmental secretaries as to where the cuts should be made and the jobs that should be eliminated" (E.89).

COMAR 06.01.01.01 defines "appointing authority" as "a person who has the power to make appointments and to terminate employment". An example of the control exercised by the appointing authorities in deciding which positions

would be abolished is found in the correspondence from Comptroller Louis Goldstein to Col. Elmer Tippet (E.190) and Tippet's response thereto (E.191) regarding how Tippet determined which specific positions would be eliminated at the Maryland State Police in response to the Board of Public Works action of October 2, 1991. Goldstein inquired " I would appreciate it if you would advise me how **you arrived at the decisions that you made** relating to the Maryland State Police personnel terminations." In reply, Tippet stated "Lastly, I will address the issue on how **I identified** which sworn police employees would be terminated..." He does so in the balance of the letter.

While the positions were ultimately restored to the Maryland State Police due to public outcries, this

exchange demonstrates how an agency through Col. Tippet, the appointing authority for the State Police, exercised control over who would be terminated. Choices were made, and the Board requested that the appointing authorities provide this information in advance of its October 2, 1991 action.

Managements' control over which employees would be terminated is also demonstrated by the letters attached to Misc. Item 2-S (E.154). That attachment contains letters from the Office of the State Prosecutor, the Maryland State Archives, the Office on Aging, the Military Department, Commission on Human Relations, the Veterans Commission, the Maryland State Treasurer, the Department of Assessments and Taxation, the Department of Budget and Fiscal Planning, the Department of

Personnel, the Department of General Services, the Department of Natural Resources, the Department of Licensing and Regulation and several other departments, each of which specifically identifies positions to be abolished, by PIN number, to the Department of Budget and Fiscal Planning. These letters were prepared at the request of Secretary Benton, who requested each agency to identify positions to be abolished prior to the October 23 Board meeting.

The responses to the call for lists of positions to be terminated demonstrate the independence with which the appointing authorities made their decisions, which were then merely adopted by the Board and the Governor. Robert Perciasepe, Secretary of the Department of the Environment replied: "I am requesting

that the following positions be included in the Board of Public Works' agenda for abolition effective November 1, 1991" (E.187). He then provides a list of positions that were in turn eliminated by the Board. Christopher Allen, Administrator of the State Archives, provides a similar demonstration of control over who would be laid off: "I am writing in response to your request of October 15 for a schedule of positions to be presented to the Board of Public Works for abolition or reduction" (E.157). These responses all demonstrate that dispositive choices were made by those at the agency level regarding which employees would be laid off by the Board on October 23, 1991. At that October 23 meeting, the Board abolished the specific positions recommended by the Agencies, on the dates directed, **without**

variation.

Management had control over which employees would lose their jobs, and management had control over when those employees would lose their jobs. These appointing authorities, who clearly had the power to terminate employment, were required to have followed the layoff laws. In choosing not to do so, management has generated a grievable issue according to Article 64A, §52.

Subsequent to being notified of the termination of their positions, Appellants requested, and were denied the rights described in Article 64A, §35 and implemented by COMAR 06.01.01.44. COMAR 06.01.01.44 provides:

> B. Employees who are in positions that are to be abolished, discontinued, or vacated because of change in departmental organization or because of work stoppage or lack

of work shall be laid off.

B-1. The appointing authority shall notify the Secretary in writing of the number of positions abolished, discontinued, or vacated, together with the reasons for them, and the list of names of employees to be laid off. The Secretary shall review the written notice and certify that the order of layoff is appropriate. The appointing authority shall notify employees who are to be laid off at least 90 calendar days before the effective date of the layoff.

* * *

D. Sequence of Layoff.

(1) An appointing authority first shall lay off employees who are on a temporary basis pending examination (TP), and who are in the classification in which the layoff is to occur, in accordance with §F of this regulation.

(2) The appointing authority next shall lay off employees who are serving an original probationary period, and who are in the classification in which the layoff is to occur, in accordance with §F of this regulation.

(3) The appointing authority next shall lay off permanent employees who have completed an original probationary period, and who are in the classification in which the layoff is to occur, in order of seniority, with the employee having the lowest number of seniority points being laid off first.

* * *

G. An employee in a position which is to be abolished, discontinued, or vacated shall be allowed to displace another employee with the least seniority in the same job classification, or, if not available, either:

(1) Progressively to each lower level classification in the same job series; or

(2) In any other job classification in which the employee held satisfactory permanent status.

The individual State agencies denied these rights under a claim that the positions were abolished by "operation of law", that Appellants had no rights under

the Merit System Law, and that their complaints were not grievable.

The mere fact that the Appellant's positions were abolished by an act of the Board does not exempt the various agencies from applying the law as it exists; indeed, Maryland State Finance and Procurement Code Ann. §7-213 (1984), which empowers the Governor to make budget reductions (including the elimination of employees' salaries) with the approval of the Board, requires the Governor to do so in accord with the Merit System Law. Specifically, §7-213 (b)(3) provides, "**Except as provided in the Merit System Law**, the Governor may not reduce an appropriation for the salary of an employee in the classified or unclassifed services." Since this grievance seeks relief from the manner of layoff (not the layoffs

themselves) and because the issues arise directly from actions by the employer and the application of the layoff rules and regulations to them, the OAH has jurisdiction to hear this grievance.

The Governor, under State Finance and Procurement Article §7-213(a), has the authority, with the approval of the Board of Public Works, to reduce by no more than 25% appropriations that the Governor considers unnecessary. In executing this law in the present case, the Governor and the Board reduced appropriations for various positions which were selected by the appointing authorities of the state agencies. The Governor allowed the management authorities to exercise unfettered discretion and complete control in virtually all decisions as to terminated

jobs and effective dates.[1] The agencies were not acting according to §7-213, a statute the authority over which management admittedly has no control. They were, however, submitting the information to the Governor identifying which jobs had been selected for abolition, and this submission of information dictated which jobs were abolished. Although it many not have had control over the fact that positions had to be cut, management did maintain control over which positions were abolished. Thus, within the definition of "grievance", the termination of these jobs was clearly the result of an action by the appointing authorities, and clearly management did

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[1] The state trooper positions which were to have been abolished were restored as a response to public outrage. Hundreds of state police officers descended in force to protest the elimination of the 83 trooper positions. See Baltimore Sun, October 3, 1991, p.1B, col.4. (E.117).

have control. The denial of Appellants' layoff rights is a grievable issue within the jurisdiction of the Office of Administrative Hearings.

2. There is no authority for the circumvention of the clear language of the applicable statutes and regulation by the Governor or the Board of Public Works.

Having found that management did have control over the selection of abolished positions and over the dates upon which the terminations were to take effect, it fell upon management to comply with Appellants' layoff rights under Article 64A, §35 (1988). That section provides in part:

§35. Laying off employees.

(a) Applicability. -- The provisions of this section that govern the layoff and reinstatement of unclassified employees do not apply to the Board for the Injured

Workers Insurance Fund or the unclassified employees of the central collection unit.

(b) In general. -- Employees who are in positions that are to be abolished, discontinued, or vacated, because of a change in departmental organization or a stoppage or lack of work, shall be laid off.

(c) Secretary to establish procedures. -- Except for faculty and other unclassified employees of the State institutions of higher education and their governing boards, the Secretary of Personnel shall establish uniform procedures among State agencies, by rule and regulation, for:

(1) The layoff of State employees regardless of employment status;

(2) the reinstatement of laid-off classified and unclassified State employees to comparable occupational positions in State employment.

This section provides employees, "in position(s) that are to be abolished" with specific rights, particularly a uniform procedure for that layoff, displacement, and reinstatement. Other subsections in §35 detail those rights, and they are implemented by COMAR 06.01.01.44

under the power granted to the Secretary in Art. 64A, §35(c). It is clear that this section is intended to provide employees who are in positions that are to be abolished adequate notice, a fair method of termination, the opportunity for reinstatement, and the opportunity to displace other employees with lesser seniority in the same classification. In short, it is intended to provide the fairest means possible of dealing with an unpleasant necessity - the elimination of positions because of budgetary needs. As such, this section is remedial in nature and should be liberally interpreted in a fashion to accomplish its purposes. Pennsylvania Nation Mutual Casualty Insurance Company v. Gartelman, 288 Md. 151, 159, 416 A.2d 734 (1980). Its purpose would not be effectuated by holding that

those who are laid off because of a job abolition have no rights under the Merit System Law, but would be furthered by interpreting it in a fashion to give them the rights guaranteed under that section. Gartelman, 288 Md. at 154.

There is no express or implied exception in §35 which eliminates its protection when positions are abolished by agencies under the direction of the Governor and the Board of Public Works. Implying such an exception is expressly prohibited by the principles of statutory interpretation.[2] The State's belief that his is the proper way to abolish the

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[2] "Where the statutory language is plain and unambiguous, and expresses a definite meaning consonant with the statute's purpose, courts must not insert or delete words to make a statute express an intention different from its clear meaning." Gartelman, 288 Md. 151, 154, 416 A.2d 734 (1980).

Appellants' positions is not controlling because it is an interpretation contrary to the clear and unambiguous meaning of the statute. Gartelman, 288 Md. at 160; Comptroller of the Treasury v. John C. Lewis Co., 285 Md. 527, 543, 404 A.2d 1045 (1979).

Article 64A, §35 and COMAR 06.01.01.44 provide a definite and specific means by which employees are to be laid off. Maryland courts have held many times that "...where a statute authorizes or permits a person or agency to take a certain type of action in a particular manner, such manner becomes a mandatory limitation, and the action must be taken in conformity with it." Office and Professional Employees International v. MTA, 295 Md. 88, 96 (1982); Trust Company v. Ward Banking Corporation, 177 Md. 212,

220 (1939). In laying off this group of employees without giving them the rights assure them by law, the State is ignoring a specific means for action mandated by the Legislature, prohibited by a common-sense reading of the statute and the principles set out by the Court of Appeals.

Judge Thieme in the Circuit Court relied on the fact that "salary" and "position" are defined differently in Black's Law Dictionary and Webster's New Collegiate Dictionary, respectively. He found this difference dispositive in holding that §(b)(3) of State Finance and Procurement Article §7-213, the purported authority for the actions of the Governor and the Board in this case, does not apply when salaries are eliminated. (E.6) Subsection (b)(3) of §7-213 states that "Except as provided in the Merit System

law, the Governor may not reduce an appropriation for the salary of an employee in the classified or unclassified service". In Hopper v. Jones, 178 Md. 429, 13 A.2d 621 (1940), the appropriation for a specific annual salary was discontinued by the Legislature in the Budget Act, from which the Court concluded that Hopper's position was lost by operation of law. Hopper, while it is, as will be discussed below, readily distinguishable from the case at bar as it applies to Legislative actions, is useful in that, contrary to the conclusion of the lower court, if the appropriation for a salary is discontinued the corresponding position is discontinued as well.

However, the State would still argue that §7-213(b)(3) does not require Merit System law to be applied to the

discontinuation of an appropriation for a salary, but rather only to the reduction of an appropriation for a salary. They would have §7-213(b)(3) apply only in situations wherein an employee's salary is reduced by some amount that is less than 100%. Conceivably, this interpretation could result in an unfair and absurd exercise of §7-213 - that the Governor could reduce the "appropriation for a salary" by 99%, and that would not be considered the abolition of a position. Therefore, an employee could be forced out of her postion by having her salary all but entirely eliminated, yet would not be afforded layoff rights. The Legislature could not have meant to leave such a "loop-hole" in the law to allow circumvention of the Merit System.

Further, in §7-213(a), the

Governor, with the approval of the Board, is given the power to "reduce, by no more than 25%, any appropriation that the Governor considers necessary." Appellees argued in their Memorandum to the Circuit Court that such a reduction under this statute would result in **positions** being lost by operation of law. (R. 3) Thus Appellees recognize that "reduce" is used by the Legislature to mean that the Governor may eliminate appropriations for **positions** if they represent no more that 25% of an appropriation. It follows, then, that the language of §7-213 should be found to require that a reduction for the appropriation for the salary of an employee, including the abolition of that salary, can only be accomplished as provided in the Merit System Law.

The appointing authorities, who

herein by independent action terminated Appellants' positions, failed to apply the layoff provisions of the Merit System law in identifying the positions to be abolished. The layoff provisions found in Article 64A and in COMAR are certainly personnel regulations. Management made its own decision not to apply the layoff procedures. These decisions by the various appointing authorities, dealing with the interpretation of a personnel regulation, were ones over which the various managers exercised control, and thus a grievance exists within the meaning of Article 64A §52(b). The Office of Administrative Hearings does have jurisdiction over this case, and neither Governor nor the Board of Public Works had the authority to circumvent the clear language of the Merit System Laws.

B. The Governor's exercise of §7-213 of the State Finance and Procurement Article is an executive function, not a legislative function within the meaning of Hopper, and thus layoff provisions are applicable to the positions which were abolished.

The Maryland Declaration of Rights, Art. 8, provides that the legislative, executive and judicial branches of government ought to be separate and distinct from each other, and prohibits the executive from exercising legislative functions. The Maryland Court of Appeals, in discussing the Governor's power to add to or delete from the Merit System has said

> By the constitution of the State the power to enact law belongs to the general assembly, composed of the Senate and the House of Delegates, and this being so, it is a well-settled principle of constitutional law that the power thus delegated cannot be re-delegated to the people themselves. Our government is a representative government, and, to the members of the general assembly the people have confided the power to pass such laws as they, in the exercise of their judgment, may deem best for the public

> interests and they have no power to substitute the judgment of others in matters of legislation of those to whom this sovereign trust has been committed. Ahlgren v. Cromwell, 179 Md. 243, 247, 17 A.2d 243, (1940), quoting Bradshaw v. Lankford, 73 Md. 428, 430, 21 A. 66 (1891).

Attorney General Steven Sachs concluded that while legislatively-authorized executive orders have the force of law, even they may not be contrary to existing express statutory provisions. 64 Opinions of the Attorney General, 180, 184, (1979). Otherwise the Governor has no law making authority whatsoever, and no authority to contradict existing law. In this case, that law is Art. 64A, s35, and COMAR 06.01.01.44, which provide a specific remedy for State employees in the event that their jobs are "abolished, discontinued, or vacated." These are laws to which the Governor and the executive agencies must adhere; there are no

exceptions.

The State contends that the layoff provisions do not apply to the jobs in this case because they were abolished by operation of law. In support of this position, the State asserts that the actions of the Governor and the Board taken pursuant to §7-213 were legislative in nature and thus the positions were lost by operation of law. The State's central position regarding the Governor's powers when acting in concert with the Board is that when he acts to reduce the budget, and abolishes jobs in the process, he is acting with "legislative powers". As such, he is not subject to the constraints of existing law, in this case Article 64A §35. The State relies heavily on Hopper v. Jones, a case which deals with the abolition of a position by the Legislature. As such, it

is clearly not applicable to the issues in this case.

In Hopper, the Governor proposed a budget which eliminated the salary for a specifically identifiable position, that of Mr. Hopper. The General Assembly passed the proposed budget, thereby eliminating Mr. Hopper's position. The budget then became law. The Court concluded in Hopper that "since the Legislature has discontinued the appropriation for an annual salary of $1500 for an industrial accident investigator [Mr. Hopper's position], and the appellant was the only investigator receiving that salary, he lost his position by operation of law". Hopper, 178 Md. at 433. They held that since the legislature discontinued the appropriation for a specifically identifiable position, the incumbent lost his position by

operation of law and was not entitled to the layoff provisions. There were no facts in Hopper that the Mr. Hopper's department had any input into the legislature's act.

The Hopper Court deals specifically and exclusively with legislation enacted by the General Assembly. It does not consider action by the Board or by the Governor, nor does the opinion suggest that any other branch of government has law-making powers which would result in actions of that branch being dubbed an operation of law. In Hopper, the Governor, in accordance with the Budget Act of 1939, submitted a budget bill to the General Assembly. Accordingly, the legislature then had the power to debate, amend, revise, or even reduce the proposed budget before it was eventually passed and made into the law of the State

by the General Assembly. When passed by the General Assembly, the budget bill becomes law without any further action of the Governor. Maryland Constitution Article III, §52(6). The Governor's budget formulation prior to the passage of the budget by the General Assembly may be seen as somewhat quasi-legislative. The Governor's actions pursuant to statute, taken after the passage of the budget, are not.

Moreover, the Hopper Court stated that if it could not be determined which position was eliminated by the Legislature, the Court concedes that the layoff rights would have applied. Hopper, 178 Md. at 431. Hence, the mere fact that legislative action results in a layoff does not conclusively eliminate layoff rights; there must be both legislative action and

specifically-identifiable positions. In this case, the legislature has taken no action vis-a-vis Appellees' positions.

The Governor in the case at bar merely executed a law which was made by the legislature. Under §7-213, the Governor, with the approval of the Board, is given the power to reduce appropriations after the enactment of the budget bill. Such action by the Governor with the Board of Public Works approval is not comparable to what occurred in Hopper. In Hopper, the Governor's action or inaction eventually became law. In the instant grievances, the reduction in appropriation did not create or change any laws nor amend the budget. The Governor, as the head of the executive branch, merely administered a law as is his function. Such action was a ministerial act, not a legislative act, and thus the

results of that action did not come about by operation of law. Hopper is inapposite.

Mandel v. O'Hara, 320 Md. 103, (1990), is also inapplicable to the case at bar. In that case, the Court held that it was extending legislative immunity to the Governor during those times that the Governor was exercising legislative power, "particularly because of the adverse ramifications that that [contrary] rule would have on gubernatorial decision-making in preparing the executive budget under the Maryland Constitution, and Art. III, §52." Id., at 132. That holding does not apply to the instant case, where the Governor is not preparing the executive budget to be submitted for legislative tinkering and approval, but rather is simply terminating appropriations which he deems unnecessary under §7-213. Mandel deals with whether or

not the Governor has civil immunity in tort, and whether his "legislative acts", e.g. veto power, are protected in the context of tort liability.

The Governor's veto power comes directly from the people, Md. Declaration of Rights art. 1, art. 4; Md. Const. art. II, §17. The veto power is radically different by nature, and is not comparable to the power given the Governor by the Legislature through statute. With the latter, he is subject to existing law. For example, though the Governor is given the power to declare executive orders, Md. State Gov't Code Ann. §3-401 (1984), even where there is a separate enabling statute the governor has no authority to transgress existing state law. In this case, the Governor is acting to reduce an appropriation pursuant to statutory

authority, not by constitutional grant of authority. There is no meaningful analogy between the Governor's powers to veto as described in Mandel, and the power to reduce an appropriation under §7-213.

There is no authority for the proposition that §7-213 yields legislative power to the Governor. That section merely permits the Governor, with the Board's approval, to make deletions from the budget. That section prohibits the Governor from reducing the salary of a Merit System employee, except as provided by the Merit System Law. State Finance and Procurement Article §7-213(b)(3). By cutting these position and their salaries without providing the right afforded by Art. 64A §35 it is obvious that salaries are being reduced outside of the Merit System Law. This is purely an executive

action by the Governor.

The Constitution of Maryland Art. III, §52(3) requires the Governor to submit proposed expenditures to the Legislature. Subsection (5) requires him to deliver the budget bill to the presiding Officer of each House, where it is introduced by that Officer. The bill may then be amended, and even in certain circumstances reduced or increased (Art. III, §52 (6)), and becomes law only when the bill is passed both houses. Art. III, §52 (6). If the Governor had law making power in the budgetary process, then there would be no need for the Legislature to pass the bill - it would become law after action by the governor. Even in the circumstance where the Legislature cannot agree on the bill within the normal time allotted for the session, the budget bill does not become

the law by default but rather, the session is extended until the Legislature agrees and passes the bill. Article III, §52 (10). Under every set of circumstances a law is created only upon passage by the legislature: **that** is operation of law.

Subsequent to becoming law, every bill must be delivered to the Secretary of State, be assigned a chapter number, and be delivered to the Clerk of the Court of Appeals. Md. State Gov't Code Ann. §§2-1509, 2-1511, 2-1512 (1984). In this case there is no evidence that the Board of Public Works' action was enrolled in this fashion. Since the Board action approving the layoffs was not Constitutionally authorized, was not taken by any entity or individual with law-making powers, and was not enrolled as a law, it is not a law and must be viewed in the light of, and in

deference to, all other laws of the state, including Article 64A §35.

An analysis of the Board's action herein begins with the source of its power, the Constitution of Maryland, Art. XII, §2. That provides, in part, "they shall report to the General Assembly at each regular session, and recommend such legislation as they deem necessary and requisite to promote or protect the State in tne said Public Works; they shall perform such other duties as may be hereafter prescribed by law." Nowhere in this section is the Board give legislative power; on the contrary, it is given only persuasive power.

Like the Governor and other Executive agencies, the Board reports to the General Assembly, but is not a part of it. The Board is made up solely of members

of the Executive Branch: the Governor, the Treasurer, and the Comptroller of the Treasury, none of whom have legislative powers, and all of whom are specifically prohibited from exercising legislative power by the Maryland Declaration of Rights, Art. 8.

In interpreting the Board's duties the Court of Appeals has described the Board's power as administrative in nature, and has said regarding its power:

> That one member of the Board is the Governor of the State and another the comptroller, both elected by the people, does not exclude the Board, in such functions as are here involved, from the operation of the legal principles applicable to administrative agencies. The title of the governmental officers involved cannot obscure the real nature of the governmental function they are performing. Truitt v. Board of Public Works, 243 Md. 375, 388, 221 A.2d 370 (1966).

The State's conclusion that Article 64A §35 can be ignored because the

Board exercises legislative powers is simply wrong. The specific language of the Constitution of Maryland, Article XII §2, the powers delegated by the people to those on the Board, and the interpretation provided by the Court of Appeals makes it clear that this conclusion is incorrect, and that the correct conclusion is that the Board has no legislative powers, and its members and the Board as a whole are limited by "the principles that apply to administrative agencies", here, Article 64A, §35 and COMAR 06.01.01.44.[3]

When acting in the context of the Budget, or in cooperation with the Board,

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[3] To the extent that it is argued that §7-213 conflicts with Article 64A and COMAR, it is the duty of the Court, in interpreting statutes that are not irreconcilable, to construe those statutes in harmony with their respective objects. Haskell v. Carey, 294 Md. 550, 558 (1982).

the Governor and the Board are not acting with "legislative powers". Their actions do not become "operations of law" for which there is no remedy at law.

C. The rights given the Appellants under the Merit System are property interests, the deprivation of which by any branch of the government violates the prohibition against a taking of property without due process of law found in the United States Constitution and the Maryland Declaration of Rights.

The Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights both provide that citizens may not be deprived by the state of their property without due process of law. The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests in specific benefits that a person has already acquired. Board of Regents v. Roth, 408

U.S. 564 (1972). One of the traditional manifestations of a deprivation of property without due process of law is found where the legislature takes away a private party's right to recover property that is due, subsequent to the citizen's establishment of that right. Forbes Pioneer Boat Line v. Board of Commissioners, 258 U.S. 338 (1922); Vytar Associates v. City of Annapolis, 301 Md. 558, 483 A.2d 1263 (1984).

In 1972, thirty-two years after this Court's decision in Hopper, the United States Supreme Court issued in one day two landmark rulings - Board of Regents v. Roth, and Perry v. Sindermann, 408 U.S. 593. These two cases established that governmental employment is a property right within the meaning of the United States Constitution, and the Attorney General of

Maryland has approved of this principle in light of the Maryland Declaration of Rights. 70 Opinions of the Attorney General, 151 (Oct. 1985). "Property" interests subject to due process protection are not limited by a few rigid technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings". Roth, 408 U.S. at 577. A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or a mutually explicit understanding that supports his claim of entitlement to the benefit and that he may invoke at a hearing. Sindermann, 408 U.S. at 601. In Roth, the Supreme Court recognized that, to have a property interest in a benefit, a person must have more than a unilateral expectation, but must instead have a

legitimate claim of entitlement to it. Roth, 408 U.S. at 577. And, as Justice Stewart pointed out in his decision, "it is the purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined". Id. at 577. Justice Stewart, speaking again for the Supreme Court in Sindermann, further found that even a non-tenured, non-contractual teacher can have a property interest in his continued employment, of which he cannot be deprived without due process, insofar as that teacher had relied on a provision in the college's Faculty Guide that merely implied a guarantee of continued employment.[4] The respondent in

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[4] The provision in the guide in question was as follows:

"Teacher Tenure: Odessa College has (continued...)

Sindermann had, according to the Court, "alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent 'sufficient cause'". Sindermann, 408 U.S. at 602.

In the case at bar, Appellants have done much more than allege the existence of rules promulgated and fostered by state officials. There is no question as to the existence of Article 64A, §35 or COMAR 06.01.01.44, the statute and regulation which set out the layoff rights

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'(...continued)
not tenure system. The Administration of the College wishes the faculty member to feel that he has a permanent tenure as long as his teaching services are satisfactory and as long as he displays cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work." Sindermann, 408 U.S. at 600.

of a Merit System employee in Maryland. There is no denying the fact that through State Finance and Procurement Article, §7-213, the legislature limited the ability of the Governor to reduce appropriations, preventing the Governor from reducing the appropriation for the salary of an employee in the classified or unclassified service except as provided by Merit System law.

These laws and regulations, promulgated by the General Assembly to provide certain protections to classified and unclassified employees of the State of Maryland, are unquestionably relied on by those employees. An individual choosing to work for the State in such a capacity is assured through Article 64A, §35 and COMAR 06.01.01.44, that in the event her position is abolished, she will be laid off, with the right to ninety days notice, a sequence

of layoffs, seniority rights based on total service to the State, the right to displace other employees with less seniority within the same job classification, ("bumping rights") and the right to reinstatement based on the level of seniority. There is no "out" in the law - no exception that alerts employees to the fact that these rights may not be as absolute as they seem. In fact, these layoff rights are more far firmly rooted and more readily relied upon by employees than that provision in the faculty guide that the Sindermann Court found created a protectable property interest. Each Appellee has an existing, vested property right to ninety days worth of employment, as mandated by COMAR 06.01.01.44, the regulation that implements Article 64A, §35, and that interest in employment is protected under Roth and

Sindermann. The right to continued employment via the displacement rights described in §35 if positions are available, and the right to reinstatement, are also rights which Appellants did not unilaterally expect to be afforded, but rather ones which were guaranteed by statute.

The doctrine of substantive due process requires legislation to be fair and reasonable in content as well as application, the essence of substantive due process being protection from arbitrary and unreasonable action. Jeffries v. Turkey Run Consolidated School District, 492 F.2d 1, 3 (Ind. 1974). Substantive due process requires legislation to be reasonable in its application and mandates that it not be enforced arbitrarily. To deny appellants their statutorily guaranteed layoff rights

without any valid authority would indeed be an arbitrary denial of those rights. The interpretation of the Merit System law found in Hopper and urged by the Appellees creates a right which is arbitrarily afforded State employees. For example, if Appellants were state employees whose positions were eliminated because of a reduction of an appropriation to their agency by the Governor in accordance with §7-213, and the Governor then delegated to that agency the decision as to which positions would be abolished, those employees would be afforded full layoff rights as is required by §7-213(b)(3). However, because in this instance the Governor first requested from the agencies lists of positions to be terminated, and then made the reduction in appropriations, Appellants were denied layoff rights.

There seems no relevant distinction between these two scenarios, particularly no distinction which would merit the denial to Appellants of this vested property right. To interpret the Merit System law and §7-213 differently is to arbitrarily enforce legislation, and is violative of Appellants' due process rights.

Further, there likewise exists in the applicable laws no exception which would permit the Legislature to circumvent state employees right to layoff procedures in this instance. The express language of Article 64A, §35 is clear - "Employees who are in positions that are to be abolished, discontinued, or vacated, because a change in departmental organization, or through stoppage or lack of work, shall be laid off", and employees who are "laid off" are, under §35 and COMAR, entitle to layoff

rights. These rights are explicitly guaranteed. There is no indication in the language of the statute that the General Assembly intended an exception to be had when positions are abolished as result of legislative action - to infer an exception would ignore another basic rule of statutory interpretation. "The rule of statutory construction is clear that in ascertaining the intention of a legislative body all parts of the statute must be read together and all parts must be reconciled and harmonized if possible. [Citations omitted] All parts of the statute must be read together so that no part becomes superfluous." City of Baltimore v. Bruce, 46 Md. App. 704, 713, 420 A.2d 1272 (1980). By interpreting this statute in a fashion such that these employees, whose positions are to be abolished, have no rights where

it so obviously intends to protect them in precisely this situation renders s35(a) superfluous. The Legislature cannot have intended that its express mandate be ignored. Hence, it is clear that the Appellants have a vested property interest in their layoff rights under Roth and Sindermann, and their rights to due process of law were violated by the State's denial thereof.

D. 1992 Maryland Laws Ch. 62 (House Bill 458) retroactively strips Appellants of their vested property rights in violation of the United States Constitution and the Maryland Declaration of Rights.

It is clear that each Appellant has an existing property right to ninety days worth of employment if that individual is to be laid off, the right to continued employment via the displacement rights

described in §35 if positions were available, and the right to reinstatement. Upon denial of their property rights, each sought relief through the Office of Administrative Hearings and was successful. The decision by Administrative Law Judge Mackel clearly set forth their rights to the salary loss which resulted from the lack of adequate notice, and any displacement rights.

Subsequent to that ruling, on the second to last day of the Legislative session, the General Assembly enacted House Bill 458 (H.B. 458), now found in 1992 Maryland Laws Ch. 62, which provides in pertinent part that

> (a) To clarify interpretation of existing law, the General Assembly finds that provisions of Article 64A, §35 of the Code do not apply when positions are deleted from the State budget under certain circumstances.
>
> (b) Article 64A, §35 of the Code is

inapplicable when positions are deleted from the budget:

(1) By the Governor's decision to omit an appropriation for a position from the budget bill as evidenced in the supporting documentation submitted with the budget;

(2) By the General Assembly's decision to strike out an appropriation for a position as evidenced in the budget bill or in the report of the budget committees; or

(3) By the Governor's decision pursuant to §7-213 of the State Finance and Procurement Article, with the approval of the Board of Public Works, to reduce an appropriation for a position included in the budget bill as encated, as evidenced in the supporting documentation submitted to the Board.

The result of this law is a total divestment of Appellants' rights to continued employment via displacement or back pay due to the lack of adequate notice.

In analyzing the State's ability to divest citizens of vested property, the United State Supreme Court has ruled that

once a citizen's right to property has vested by a court decision or legislative act, the legislature can not later, as a result of litigation, enact a retroactive statute that abolishes a valid claim for compensation. Ettor v. Tacoma, 228 U.S. 148 (1913), Forbes v. Commissioners, 258 U.S. 338, 340 (1922). In a similar fashion, the Maryland Court of Appeals has held that the legislature may not retroactively change legislative policy in a way that denies a private party the right to recover money that is due when the act is passed. Washington National Arena v. Prince George's County, 287 Md. 38, 45, n.3, 55, 410 A.2d 1060 (1980), Vytar Associates v. Annapolis, 301 Md. 558, 570-572 (1984). In the instant case Appellants had the right to recover money and/or property because of a lack of notice and the right to continued

employment via displacement rights. H.B. 458 took away that right in precisely the fashion forbidden by the Supreme Court in Ettor and Forbes, and the Maryland Court of Appeals in Washington and Vytar.

The language of H.B. 458 indicates that it is merely an attempt to "clarify" an interpretation of existing law. As such the Legislature attempts to cloak the bill in the guise of a "curative" act which is not unconstitutionally retroactive. There is no question that H.B. 458 specifically states that layoff rights do not apply when positions are deleted from the State's budget by virtue of §7-213. This exception is found no where in the text of §7-213, and as described above was previously, specifically prohibited by the legislative policy underlying that section. The bill

creates a totally new right in the Board to act without concern for §35, and destroys a right in the Appellants. This is not a situation where §35 was ambiguous, or where there was pre-existing authority for the Board to act in this manner or where H.B. 458 merely makes changes in procedure. Rather, this is a change in the legislative policy; the policy that when layoffs must occur, it will be done in an orderly fashion protecting those with the greatest service recorded with the State.

The fact that the Legislature now express a different intent - that there should be no layoff rights - and that H.B. 458 is merely "curative" does not convert this change in policy to a ratification of a "technical defect." Forbes, 258 U.S. at 339-340. Washington National Arena v. Prince George's County, 287 Md. 38, 51, 402

A.2d 148 (1980). Looking at the analytic factors suggested by Washington, 287 Md. at 51, there can be no question that this is a change in legislative policy resulting in unconstitutional retroactivity. First, the retrospective application of H.B. 458 works a substantial injustice on the Appellants, in so far as it deprives them of not only money for absence of notice, but also of the prospect for continued employment under displacement rights. Second, the radical abrogation of this retroactive statute could not have been anticipated at the time the Appellants assumed their positions with the State. Third, looking at the authority under which the government was acting, there is absolutely no authority under §7-213 to act in the fashion that the State has. Indeed its only authority was the two opinions of the Attorney General that

completely ignored both the plain meaning of §7-213, and failed to analyze the source of power for the Board, the Constitution of Maryland. Lastly, H.B. 458 creates a whole new pallet of rights for the Board of Public Works, and abrogates rights for the Appellants. Hence, the changes are not small, technical or "clarifying". Viewing all of these factors, as suggested by the court in Washington, it is clear that this is not a curative act but is in fact the retroactive destruction of a substantive right. Despite the fact that H.B. 458 claims to be "clarifying", it must be recalled that one cannot place much weight on a subsequent legislature's comments on what a prior legislature meant. Washington, 287 Md. at 54 n.7. Collier v. Connolley, 285 Md. 123, 126 (1979). As the Court of Appeals in Washington stated:

> Furthermore, as in Forbes and Martin the mere fact that the Legislature in Chapter 129 couched the language in "curative" terms and recited (contrary to the language of the prior statute) that its intent had always been the same, does not convert a retroactive policy change into a permissible ratification statute [footnote omitted]. The presence of "curative" language or a recital that the Legislature in the past really intended what is now being enacted into law, can not render a statute immune from constitutional challenge on retroactivity grounds. If it did, any retroactive legislation could be shielded from a successful constitutional act merely by the insertion of such language. Washington, 287 Md. at 54.

This is precisely what has happened in this case. Both the Legislature and the Attorney General have couched H.B. 458 in "clarifying" terms when it actually represents a substantial policy change from what the Legislature previously meant in enacting and amending §35. As a result it violates both the United States Constitution, Art. 1, §10; the Fourteenth

Amendment to the United States Constitution and the Maryland Declaration of Rights, Art. 8, and Art. 24.[5]

Even analyzing H.B. 458 in the light of non-constitutional analysis, it can not withstand scrutiny. In WSSC v. Riverdale Fire Company, 308 Md. 556, 550 A.2d 1319 (1987) the Maryland Court of Appeals set out Common Law principles for analyzing any statute with retroactive

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[5] The April 3, 1992 Opinion of the Attorney General (E...) utterly fails to analyze the Constitutional implication of House Bill 458 and refers only to Common Law analyses of retroactivity. The case it cites regarding the constitutional aspects of retroactivity, Massey Motors v. United States, 364 U.S. 92 (1960) contains no discussion whatsoever of the due process implications of a retroactive statute. In that case the court dealt with the meaning of depreciation regulations and congressional approval of a prior I.R.S. usage. Likewise the secondary authority cited in that opinion deals with retroactive interpretive rules of administrative agencies and in no way discusses the constitutional implication generated by H.B. 458.

effect:

1. Statutes are presumed to operate prospectively, unless a contrary intent appears;

2. A statute governing procedure or remedy will be applied to cases pending when the statute becomes effective;

3. A statute will be given a retrospective effect if that is the legislative intent;

4. **A statute, even if intended to apply retrospectively, will not be given affect if it will take vested rights, deny due process or violate the prohibition against ex post facto laws.** WSSC, 308 Md. at 564 [emphases supplied].

Applying those principals, H.B. 458 must be applied prospectively to all cases where individuals are terminated by the Board of Public Works subsequent to its

enactment in April, 1992. While the Attorney General claims that it states a retroactive intent, typically the presumption against retroactivity is rebutted only when there is a clear expression in the statute to the contrary. Id., 561, State Farm Mutual Automobile Insurance v. Hearn, 242 Md. 575 , 219 A.2d 820 (1966); Bell v. State, 236 Md. 356, 369, 204 A.2d 54 (1964). This clear statement of intent usually takes the form of describing precisely when it is to apply, e.g. in Evans v. McCoy, 291 Md. 562, 436 A.2d 435, 570 (1981), the Legislature expressed its retrospective intent by the words "the provision of this subsection shall apply to those adopted persons as to whom the interlocutory decree of adoption, if any, and if none, the final Decree of Adoption was entered on or after June 1,

1947". This amendment was made by chapter 287 of the acts of 1961. H.B. 458 has no specific statement of retrospective intent, but rather couches itself as "clarifying" existing law, and makes no specific reference to any retrospective intent, or date of effectiveness. Where the legislature has not indicated a specific date for retroactivity, the Maryland Court of Appeals has held that that is sufficient to show that the legislature did not intend the statute to be retroactive. Slate v. Zitomer, 275 Md. 534, 545, 341 A.2d 789 (1975). In the absence of a specific legislative intent to the contrary, the statute is then presumed to act prospectively.[6]

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[6] The April 3, 1992 opinion of the Attorney General cites State v. Burning Tree Club, 315 Md. 254 (1989) to stand for the proposition that the statute was

(continued...)

Regarding the second factor described in WSSC, the statute here does not deal with a "procedure" or a "remedy" but goes to the existence of a substantive right - to notice and to continued employment. With regard to the third and fourth factors, even statutes that are intended to be applied retrospectively will not be so given that effect if there is the denial of a vested right or a denial of due process.[6] Here, there is no clearly

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[6](...continued)
declared retroactive without an express retroactivity clause. In that case the question was not one of retroactivity, but one of the contracts clause, and whether the statute violated Article 1, Section 10 of the United States Constitution. It found that giving the statute in that case effect only in the future would have rendered the whole statute a nullity, violating common sense principles of statutory interpretation. Retroactivity, as a violation of due process, does not appear to have been raised by the parties in that case nor discussed by the Court, because it was not on issue in that case.

expressed intent to make H.B. 458 retroactive, and as described above it violates Appellees vested due process rights.

CONCLUSION

Layoff rights for classified and unclassified State employees are well-rooted in Maryland public-sector labor law, and such vested rights are the property of those employees. The denial of these rights herein creates a grievable issue, well within the jurisdiction of the Office of Administrative Hearings. The elimination of positions without affording the Appellants their rights to 90 days notice of job abolition, a sequence of layoffs based on seniority, and their right to displace other employees with less seniority, is prohibited by the plain

meaning of Article 64A, §35. The taking of these rights by virtue of a retroactive law is prohibited by the due process guarantees of the United States Constitution and the Maryland Declaration of Rights. For the reasons stated in this Brief, the decision of the Circuit Court should be reversed, and the Order of the Administrative Law Judge should be reinstated.

APPENDIX E

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

STATE OF MARYLAND
DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONAL SERVICES

Appellants

v.

MICHAEL ADAMS, et al. Case No. C-92-03264AA

Appellees

* * * * * * *

APPELLEES' MEMORANDUM OF LAW

I. Introduction

Appellees are all employees of the State of Maryland whose positions were abolished as a result of action by the Board of Public Works on October 23, 1991. All were terminated as of January 1, 1992(most by November 1, 1991) and none were given the benefit of the rights described in Md. Ann. Code Art. 64A, §35 (1988) and COMAR 06.01.01.44 for employees

in positions that are to be abolished. Those rights include a sequence of layoff based on position type (temporary, contractual, probationary, permanent) the right to displace employees with less seniority and ninety-days notice prior to termination. This case requires that the court determine whether or not those rights exist when the positions are lost by virtue of Board of Public Works action, the limits of gubernatorial power when acting under St. Fin. And Proc. Code Ann. § 7-213, and whether the enactment of H.B. 458, purporting to retroactively give the Governor power to abolish positions without regard to §35, violates Appellees rights under the United States Constitution and the Maryland Declaration of Rights.

II. FACTS

[This section omitted for brevity.]

III. ISSUES

A. Whether layoff rights granted under Art. 64A §35 exist despite the power to reduce appropriations under Maryland State Finance and Procurement Code Ann. § 7-213?

B. Whether H.B. 458 purporting to give the Governor retroactive authority to abolish positions violates federal and state due process requirements precluding the taking of vested property rights?

C. Whether H.B. 458 constitutes a "special law" in violation of the Constitution of Maryland, Art. III, §33.

IV. ARGUMENT

A. Principles of Statutory Interpretation Reflect a Legislative Intent to Provide Layoff Rights Without Exception for Action by the Board of Public Works.

[This section omitted for brevity.]

B. The Governor has no Law-Making Power and can not Abolish Merit System Positions

by Operation of Law.

[This section omitted for brevity.]

C. The Failure to Implement Lay Off Rights Occurred at Agency Management Level.

[This section omitted for brevity.]

D. House Bill 458 Retroactively Strips Appellees of their Vested Property Rights in Violation of the United States Constitution and the Maryland Declaration of Rights.

The Fourteenth Amendment to the United States Constitution and Art. 24 of the Maryland Declaration of Rights both provide that citizen may not be deprived of their property without due process of law. One of the traditional manifestations of a deprivation of property without due process of law is the where the legislature takes away a private party's right to recover property that is due, subsequent to the citizen's establishment of that right.

Forbes Pioneer Boat Line v. Board of Commissioners, 258 U.S. 338, 42 S.ct. 325 (1922), Ettor v. Tacoma, 228 U.S. 148 (1913); Vytar Associates v. City of Annapolis, 301 Md. 558, 483 A.2d 1263 (1984).

At the threshold it must be determined whether there is an "interference with vested rights or contractual obligations." Washington National Arena v. Prince George's County, 287 Md. 38, 46, 402 A.2d 148 (1980). Typically, vested rights are those described as a right which can not be taken away by statute. Id., 46. Here, each of the Appellees was an employee of the State of Maryland, and each was terminated from his or her position without the benefit of the rights accruing under §35 and COMAR. Those rights included 90 days notice, and the ability to displace

others with less seniority. Governmental employment is a property right within the meaning of the United States Constitution. Board of Regents of State College v. Roth, 408 U.S. 578, 576-577 (1972). The Attorney General has approved of this principle in the light of the Maryland Declaration of Rights. 70 Opinions of the Attorney General, 151 (Oct. 1985).

Consequently, each Appellee has an existing property right to ninety days worth of employment that individual was to be laid off, the right to continued employment via the displacement rights described in §35 if positions were available, and the right to reinstatement. Upon denial of their property rights, each sought relief through the Office of Administrative Hearings and was successful. The decision by Judge Mackel crystallized

their rights to the foregoing salary resulting from the lack of adequate notice, and any displacement rights.

Subsequent to that ruling, on the second to last day of the Legislative session the General Assembly enacted House Bill 458 which provides that Art. 64A, §35 does not apply when positions are deleted from the budge bill pursuant §7-213 by the Governor and the Board of Public Works, the result being a total divestment of Appellees' rights to continued employment via displacement or back pay due to the lack of adequate notice.

In analyzing the State's ability to divest citizens of vested property, the United State Supreme Court has ruled that once a citizen's right to property has vested by a court decision or legislative act, the legislature can not later, as a

result of litigation, enact a retroactive statute that abolishes a valid claim for compensation. Ettor v. Tacoma, 228 U.S. 148 (1913), Forbes v. Commissioners, 258 U.S. 338, 340 (1922). In a similar fashion, the Maryland Court of Appeals has held that the legislature may not retroactively change legislative policy in a way that denies a private party the right to recover money that is due when the act is passed. Washington National Arena v. Prince George's County, 287 Md. 38, 45, n.3, 55, 410 A.2d 1060 (1984). In this case Appellees had the right to recover money and/or property because of a lack of notice and the right to continued employment via displacement rights. House Bill 458 took away that right in precisely the fashion forbidden by the Supreme Court in Ettor and Forbes, and the Maryland Court of Appeals

in Washington and Vytar.

The language of House Bill 458, the Opinion of the Attorney General attached to the state's memorandum as Exhibit 6 describes the bill as on "clarifying" an interpretation of existing law. As such the legislature and the Attorney General attempt to cloak the bill in the guise of a "curative" act which is not unconstitutionally retroactive. There is no question that House Bill 458 specifically states that layoff rights do not apply when positions are deleted from the State's budget by virtue of §7-213. This exception is found no where in the text of §7-213, and as described above was previously, specifically prohibited by the legislative policy underlying that section. The bill creates a totally new right in the Board to act without concern for §35, and

destroys a right in the Appellees. This is not a situation where §35 was ambiguous, or there was preexisting authority for the Board to act in t his manner or where House Bill 458 merely makes changes in procedure. Rather, this is a change in the legislative policy; the policy that when layoffs must occur, it will be done in an orderly fashion protecting those with the greatest service record with the State.

The fact that the legislature now express a different intent - that there should be no layoff rights - and that House Bill 458 is merely "curative" does not convert this change in policy to a ratification of a "technical defect." Forbes, 258 U.S. at 339-340. Washington National Arena v. Prince George's County, 287 Md. 38, 51, 54. Looking at the analytic factors suggested by Washington,

287 Md. at 51, there can be no question that this is a change in legislative policy resulting in unconstitutional retroactivity. First, the retrospective application of House Bill 458 works a substantial injustice on the Appellees, insofar as it deprives them of not only money for absence of notice, but also of the prospect for continued employment under displacement rights. Second, the radical abrogation of this retroactive statute could not have been anticipated at the time the Appellees assumed their positions with the State. Third, looking at the authority under which the government was acting, there is absolutely no authority under section 7-213 to act in the fashion that the State has, indeed their only authority was the two opinions of the Attorney General that completely ignored both the

plain meaning of Section 7-213, and failed to analyze the source of power for the Board, the Constitution of Maryland. Lastly, H.B. 458 creates a whole new pallet or rights for the Board of Public Works, and abrogates rights for the Appellees. Hence, the changes are not small, technical or "clarifying". Viewing all of these factors, as suggested by the court in Washington, it is clear that this is not a curative act but is in fact the retroactive destruction of a substantive right.

Despite the fact that H.B. 458 claims to be "clarifying" it must be recalled that one can not place much weight on a subsequent legislature's comments on what a prior legislature meant. Washington, 287 Md. 38, 54 n. 7. Collier v. Connolley, 285 Md. 123, 126 (1979). As the Court of Appeals in Washington stated:

> Furthermore, as in Forbes and Martin the mere fact that the legislature in Chapter 129 couched the language in "curative" terms and recited (contrary to the language of the prior statute) that its intent had always been the same, does not convert a retroactive policy change into a permissible ratification statute [footnote omitted]. The presence of "curative" language or a recital that the Legislature in the past really intended what is now being enacted into law, can not render a statute immune from constitutional challenge on retroactivity grounds. If it did, any retroactive legislation could be shielded from a successful constitutional act merely by the insertion of such language. Washington, 287 Md. at 54.

This is precisely what has happened in this case. Both the Legislature and the Attorney General have couched House Bill 458 in "clarifying" terms when it actually represents a substantial policy change from what the legislature previously meant in enacting and amending §35. As a result it

violates both the Unites States Constitution, Art. 1, §10; the Fourteenth Amendment to the United States Constitution and the Maryland Declaration of Rights, Art. 8, and Art. 24.[1]

Even analyzing H.B. 458 in the light of non-constitutional analysis, it can not withstand scrutiny. In WSSC v. Riverdale Fire Company, 308 Md. 556, 550 A.2d 1319

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[1] The April 3, 1992 opinion of the Attorney General attached to the State's memorandum as Exhibit 6 utterly fails to analyze the Constitutional implications of House Bill 458 and refers only to common-law analyses of retroactivity. The case it cites regarding the constitutional aspects of retroactivity, Massey Motors v. United States, 364 U.S. 92 (1960) contains no discussion whatsoever of the due process implications of a retroactive statute. IN that case the court dealt with the meaning of depreciation regulations and congressional approval of a prior I.R.S. usage. Likewise the secondary authority cited in that opinion deals with retroactive interpretive rules of administrative agencies and in no way discusses the constitutional implications generated by H.B. 458.

(1987) the Maryland Court of Appeals set out common law principles for analyzing any statute with retroactive effect.

1. Statutes are presumed to operate prospectively, unless a contrary intent appears;

2. A statute governing procedure or remedy will be applied to cases pending when the statute becomes effective;

3. A statute will be given a retrospective effect if that is the legislative intent;

4. A statute, even if intended to apply retrospectively, will not be given affect if it will take vested rights, deny due process or violate the prohibition against ex post facto law. WSSC, 308 Md. App. 564.

Applying those principals, House Bill 458 must be applied prospectively to all

cases where individuals are terminated by the Board of Public Works subsequent to it enactment in April, 1992. While the Attorney General claims that it states a retroactive intent, typically the presumption against retrospectivity is rebutted only when there is a clear expression in the statute to the contrary. Id., 561, State Farm Mutual Automobile Insurance v. Hearn, 242 Md. 575, 219 A.2d 820 (1966); Bell v. State, 236 Md. 356, 369, 204 A.2d 54 (1964). This clear statement of intent usually takes the form of describing precisely when it is to apply, e.g. in Evans v. McCoy, 291 Md. 562, 436 A.2d 435, 570 (1981), the Legislature expressed its retrospective intent by the words "the provision of this subsection shall apply to those adopted persons as to whom the interlocutory decree of adoption,

if any, and if none, the final Decree of Adoption was entered on or after June 1, 1947". This amendment was made by chapter 287 of the acts of 1961. H.B. 458 has no specific statement of retrospective intent, but rather couches itself as "clarifying" existing law, and makes no specific reference to any retrospective intent, or date of effectiveness. Where the legislature has not indicated a specific date for retroactivity, the Maryland Court off Appeals has held that that is sufficient to show that the legislature did not intend the statute to be retroactive. Slate v. Zitomer, 275 Md. 534, 545, 341 A.2d 789 (1975). In the absence of a specific legislative intent to the contrary, statute is then presumed to act

prospectively.[2]

Regarding the second factor described in WSSC, the statute here does not deal with a "procedure" or a "remedy" but goes to the existence of a substantive right - to notice and to continued employment. Third and fourth, even statutes that are intended to be applied retrospectively will not be so given that effect if there is the denial of a vested right or a denial of due

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[2] The April 3, 1992 opinion of the Attorney General cites State v. Burning Tree Club, 315 Md. 254, 554 A.2d 356 (1989) to stand for the proposition that the statute was declared retroactive without an express retroactivity clause. In that case the question was not one of retroactivity, but on of the contracts clause, and whether the statute violated Art. 1, §10 of the United States Constitution. It found that giving the statute in that case effect only in the future would have rendered the whole statute a nullity, violating common sense principles of statutory interpretation. Retroactivity, as a violation of due process, does not appear to be have been raised by the parties in that case nor discusses by the Court, because it was not on issue in that case.

process. Here, there is no clearly-expressed intent to make House bill 458 retroactive, see intra, p. 28 and as described above it violates Appellees vested due process rights.

Lastly, House Bill 458 violates Art. III, §33 of the Maryland Constitution providing that the General Assembly shall "pass no special law, for any case, for which provision has been made, by an existing general law." Const. of Md., Art. III, §33. The Court of Appeals has defined "special laws" as "ones that relate to a particular person or things or a class, as distinguished from a general law which applies to all persons or things of class." Prince George's County v. B & O Rail Road, 113 Md. 179, 183 (1910). In this case, House Bill 458 was enacted specifically for the purpose of eliminating the Appellee's

rights after having successfully litigated their case before the Office of Administrative Hearings. In Cities Service Co. v. Governor, 290 Md. 553, 507, 431 A.2d 663 (1980), the Court of Appeals examined decision arising through Art. III, §33 and suggested a pattern for analysis for determining whether a statute is a "special law". They are: whether the underlying purpose of the legislation is to benefit or burden a particular class member or members; whether particular people are identified in the statue; and what the substance and practical effect of the statute is, versus its form. Id., 273; State v. Good Samaritan Hospital, 299 Md. 310, 473 A.2d 892 (1984); State v. Burning Tree Club, 315 Md. 254, 273, 554 A>2d 366 (1989).

First, the underlying purpose of H.B.

458 is to burden a very limited group of citizens: state employees who have had their jobs abolished by the Board in its October 23, 1991 actions. The direct, and only beneficiary by the terms of the statute and this is precisely what the prohibition of special laws was designed to prohibit.

> [T]he constitutional provision was wisely designed to prevent the dispensation or grant of special privileges to special interest, through the instrumentality of special legislation, in conflict with previously enacted general legislation covering the same subject matter..."

Jones v. House of Reformation, 170 Md. 43, 56, 3 A.2d 728 (1939).

Second, while the individuals are not named in the statute, at the time the statute was enacted their identities were known because of the active litigation at the Office of Administrative Hearings and

at the Circuit Court for Anne Arundel County. The practical result of the law is to obliterate Appellees substantive right to property. Just as importantly, as a result of this special law, the State has obtained a special advantage under this legislation - it has exempted itself from a current court ruling and the potentiality that any future court rulings can go against it in this specific case.

VI. CONCLUSION

Layoff rights for State employees who have had their jobs abolished by the Executive Branch of Government have been a part of Maryland public-sector labor law for many years, and destruction of those rights by a single act of the Board of Public Works is both unconscionable, and unlawful; it is prohibited by the plain meaning of Art. 64A, §35, and the Boards

lack of law-making authority. The Legislature can not eliminate the Appellee's rights to notice of job abolition and right to displace other employees by virtue of a retroactive law because it is prohibited by due process rights guaranteed by the United States Constitution and the Maryland Declaration of rights. For the reasons stated in this memorandum and those stated at the time or argument, the Appellees respectfully request that they be given the full benefit of the Merit System Law, Art. 64A, Section 35 and COMAR 06.01.01.44, and that the decision below be upheld.

Respectfully submitted

Supreme Court, U.S.
FILED
DEC 7 1994
OFFICE OF THE CLERK

No. 94-1017

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL ADAMS, ET AL.,

Petitioners,

v.

STATE OF MARYLAND
DEPARTMENT OF PUBLIC SAFETY AND
CORRECTIONAL SERVICES, ET AL.,

Respondents.

SUPPLEMENTAL APPENDIX
PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF MARYLAND

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No. 94-1017

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL ADAMS, ET AL.,

Petitioners,

v.

STATE OF MARYLAND
DEPARTMENT OF PUBLIC SAFETY AND
CORRECTIONAL SERVICES, ET AL.,

Respondents.

SUPPLEMENTAL APPENDIX
PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF MARYLAND

APPENDIX 1

APPENDIX H

SUPPLEMENTAL LIST OF PARTIES

A. Those parties listed in the caption of this case.

B. The following are parties and were Grievants in the proceedings at the Office of Administrative Hearings:

1. Martin Salisbury, Employee of the Maryland Department of PI;

2. Albert Jennings, Employee of the Maryland Department of Public Safety & Correctional Services;

3. Walter Payton, Employee of the Maryland State Police;

4. Glendora Gordon, Employee of the Maryland State Department of Public Safety & Correctional Services;

5. Gregory Moore, Employee of the Maryland Correctional Adjustment Center;

6. Jess Defonzo, Employee of the MPRS;

7. Donna Webster, Employee of the Maryland Correctional Institution - Hagerstown;

8. George Drake, Employee of the Roxbury Correctional Instituiton;

9. Sharon Couleter, Employee of the Roxbury Correctional Instituiton;

10. Mary E. White, Employee of the Maryland Correctional Training Center;

11. Joseph Cromer, Employee of the Maryland State Police;

12. Paul Gross, Employee of the Maryland State Police;

13. Craig Lee Sullivan, Employee of the Maryland Correctional Instituiton - Hagerstown;

14. Alice Siegel, Employee of the Maryland State Police;

15. Conway Bailey, Employee of the Maryland House of Corrections;

16. Ronald S. Bridge, Employee of the Maryland Correctional Instituiton - Jessup;

17. Diane J. Bell, Employee of the Maryland State Police;

18. Richard Bohn, Employee of the Maryland Department of Public Safety & Correctional Services;

19. Helen C. Howard, Employee of the Maryland Department of Juvenile Services;

20. John Sippio, Employee of the Maryland Department of Juvenile

Services;

21. Robert C. Kelly, Employee of the Maryland Department of Juvenile Services;

22. Karen Simms, Employee of the Maryland Department of General Services;

23. Clarence Johnson, Employee of the Maryland Department of General Services;

24. John A. Evans; Employee of the Maryland Department of Licensing & Regulation;

25. Victoria Lane, Employee of the Maryland Department of Environment;

26. John C. Reese, Employee of the Maryland Department of General Services;

27. Jeffrey Wachter, Employee of the MCPB;

28. Lillian Owens, Employee of the Maryland Schools for the Deaf;

29. Wylie Campbell, Employee of the Maryland Department of Personnel;

30. Edgar Kaufman, Employee of the MCPB;

31. Patrick E. Miller, Employee of the Maryland Schools for the

Deaf;

32. Lola Steele, Employee of the Maryland Schools for the Deaf;

33. Helen Eisenhardt, Employee of the Maryland Schools for the Deaf;

34. Eugene Caster,, Employee of the Maryland Correctional Institution - Jessup;

35. Richard K. George, Employee of the MCPB;

36. Janet Gaylon, Employee of the Maryland State Police;

37. Geraldine Mendelson, Employee of the Maryland Department of Health & Mental Hygiene;

38. George Leith, Employee of the Maryland Department of Juvenile Services;

39. Harry W. Grove, Employee of the Maryland Department of Juvenile Services;

40. Frank Johnson, Employee of the Maryland Department of Licensing & Regulation;

41. Katherine Murray, Employee of the Maryland Department of Juvenile Services;

42. Christine Siegmann, Employee of the Eastern Correctional

Institution;

43. Berline Dunnock, Employee of the Maryland Department of Juvenile Services;

44. Rosaline Anderson, Employee of the Maryland Department of General Services;

45. Celestine Morgan, Employee of the Maryland Department of Personnel;

46. Eugene Austin, Employee of the Maryland Department of Personnel;

47. Elmer Falconer, Employee of the Maryland Department of Personnel;

48. Michael Adams, Employee of the Maryland PI;

49. William Buettner, Employee of the Maryland PI;

50. Anthony Demma, Employee of the Maryland PI;

51. Leonard Finkelstein, Employee of the Maryland PI;

52. Barbara Hayes, Employee of the Maryland PI;

53. Frederick Moyer, Employee of the Maryland PI;

54. James Orzolek, Employee of the Maryland PI;

APPENDIX 6

55. Charles Schultz, Employee of the Maryland PI;

56. Donald Seymour, Employee of the Maryland PI;

57. Robert Wooldridge, Employee of the Maryland PI;

58. Richard Youngbar, Employee of the Maryland PI;

59. Howard Younger, Employee of the Maryland PI;

60. Mary Ann Brylske, Employee of the Maryland Department of Public Safety & Correctional Services;

61. Gregory Moore, Employee of the Maryland Correctional Adjustment Center;

62. Christine Siegmann, Employee of the Eastern Correctional Instituiton;

63. Cora McBridge, Employee of the Eastern Correctional Institution;

64. Claudia Nelson, Employee of the Eastern Correctional Institution;

65. Donna Webster, Employee of the Maryland Correctional Institution - Hagerstown;

66. Alice Siegle, Employee of the Maryland State Police;

67. John Witmer, Employee of the Maryland Correctional Training Center;

68. Arthur Ray, Employee of the Maryland Department of Public Safety & Correctional Services;

69. Denise Cheney, Employee of the Maryland Department of Public Safety & Correctional Services;

70. Michael Greise, Employee of the Maryland Department of Juvenile Services;

71. Arthur Femi, Employee of the Maryland Department of Juvenile Services; and

72. Robert Kelley, Employee of the Maryland Department of Juvenile Services.

C. Those parties listed in the caption of this case are Respondents herein.

D. The State of Maryland is a Respondent, along with the Department of Public Safety and Correctional Services, along with all the state agencies for which petitioners were employed as represented by the Maryland Office of the Attorney General.

APPENDIX 8

APPENDIX H

In Re: Job Abolitions

Before Administrative Law Judge Mackel

For the Maryland Office

of Administrative Hearings

MARTIN SALISBURY, ET AL.
91-DOP-PI-11-022554, MCEA
ALBERT JENNINGS, ET AL.
91-DOP-PSCS-11-2476, MCEA
WALTER PAYTON
91-DOP-MSP-11-021091, MCEA
GLENDORA GORDON
91-DOP-PSCS-11-021092, MCEA
GREGORY MORRE, ET AL.
91-DOP-MCAC-11-021265, MCEA
JESS DEFONZO
91-DOP-MPRS-11-021859, MCEA
DONNA WEBSTER
91-DOP-MCIH-11-021268, MCEA
GEORGE DRAKE
91-DOP-RCI-11-021263, MCEA
SHARON COULTER
91-DOP-RCI-11-021254, MCEA
MARY E. WHITE, ET AL.
91-DOP-MCTC-11-024138, MCEA
JOSEPH CROMER
91-DOP-MSP-11-024102, MCEA
PAUL GROSS
91-DOP-MSP-11-024107, MCEA
CRAIG LEE SULLIVAN
91-DOP-MSP-11-024107, MCEA
ALICE SIEGEL
91-DOP-MSP-11-024103, MCEA
CONWAY BAILEY

APPENDIX 9

91-DOP-MHC-11-021272, AFSCME
RONALD S. BRIDGE
91-DOP-MCIJ-11-021081, AFSCME
DIANE J. BELL
91-DOP-MSP-11-021078, D. LOFTUS, ESQ.
RICHARD BOHN
91-DOP-DPSC-11-021244, IN PROPER PERSON
HELEN C. HOWARD
91-DOP-DJS-11-022589, AFSCME
JOHN SIPPIO
91-DOP-DJS-11-023143, AFSCME
ROBERT C. KELLY, ET AL.
91-DOP-DJS-11-022716, AFSCME
KAREN SIMMS
91-DOP-DGS-11-022656, MCEA
CLARENCE JOHNSON
91-DOP-DGS-11--022657, MCEA
JOHN A. EVANS
91-DOP-DLR-11-024099, MCEA
VICTORIA LANE
91-DOP-MDE-11-021836, MCEA
JOHN C. REESE
91-DOP-DGS-11-022655, MCEA
JEFFREY WACHTER
91-DOP-MCPB-11-021094, IN PROPER PERSON
LILLIAN OWENS
91-DOP-DEFA-11-021083, AFSCME
WYLIE CAMPBELL
91-DOP-DOP-11-025152, AFSCME
EDGAR KAUFMAN, ET AL.
91-DOP-MCPB-11-024284, MCEA
PATRICK E. MILLER, ET AL.
91-DOP-DEAF-11-024186, MCEA
LOLA STEELE
91-DOP-DEAF-11-024190, MCEA
HELEN EISENHARDT
91-DOP-MCIJ-11-023147, MCEA
EUGENE CASTER
91-DOP-MCIJ-11-023147, MCEA
RICHARD K. GEORGE

APPENDIX 10

91-DOP-MCPB-11-022654, IN PROPER PERSON
JANET GAYLON
91-DOP-MSP-11-021880, L.L. LUCCHI, ESQ.
MENDELSON, GERALDINE
92-DOP-DHMH-11-000520, MCEA
GEORGE LEITH
91-DOP-DJS-11-022694, MCEA
HARRY W. GROVE, ET AL.
91-DOP-DJS-021269, MCEA
FRANK JOHNSON
92-DOP-DLR-11-000747, MCEA
KATHERINE MURRAY
91-DOP-DJS-11-022549, MCEA
CHRISTINE SIEGMANN, ET AL.
92-DOP-ECI-11-000390, MCEA
BERLINE DUNNOCK
91-DOP-DJS-11-022580, MCEA
ROSALIND ANDERSON
91-DOP-DGS-11-021862, IN PROPER PERSON
CELESTINE MORGAN
91-DOP-DOP-000824, L. JOSEY, ESQ.
EUGENE AUSTIN
92-DOP-DOP-000868, J. JOSEY, ESQ.
ELMER FALCONER
92-DOP-11-000861, L. JOSEY, ESQ.

Stephen Awalt, Esq. On behalf of members of MCEA

Jeff Bigelow On behalf of members of AFSCME

Daniel Loftus, Esq. On behalf of Diane J. Bell

Leonard L. Lucchi, Esq. On behalf of Janet Gaylon

Leronia Josey, Esq. On behalf of Celestine Morgan, Eugene Austin and Elmer Falconer

APPENDIX 11

The following employees appeared in proper person:

Richard Bohn
Jeffrey Watcher
Richard George
Rosalind Anderson

Richard George and Jeffrey Watcher adopted the oral argument and memorandum of law presented by Mr. Awalt.

MEMORANDUM ORDER ON MOTION TO DISMISS

The above captioned cases came before the Office of Administrative Hearings as a result of grievances filed by the above named individuals complaining that their positions had been abolished in violation of COMAR 06.01.01.44 and the Merit System Law, MD. ANN. Code, art. 64A. The Grievants requested to be reinstated, made whole and provided all the provisions of the Merit System Law and COMAR 06.01.01.44.

The various State agencies involved in these grievances, through the Attorney

General's Office, filed a Motion to Dismiss pursuant to COMAR 06.01.03.15. Upon receipt of the Motion, the Office of Administrative Hearings identified two preliminary issues that required resolution prior to any hearing on the merits in these matters. Accordingly, these matters were scheduled for oral argument and the various parties were notified of such. Oral argument in these matters was held on January 7, 8, 9, 10, 14 and 17th, 1992. Participating in the presentation of oral argument were:

Marlene Trestman

David R. Durfee, Jr.

Bruce P. Martin

Richard Rosenblatt

Assistant Attorney Generals

On behalf of the Respondent State Agencies

ISSUES

1. Whether the question presented is one within the jurisdiction of the Office of Administrative Hearings; and

2. Whether the Grievants are entitled to rights afforded under the layoff statue, MD. ANN. CODE, art. 64A Section 35.

SUMMARY OF ARGUMENTS

The State, through its various representatives, reiterated and reaffirmed their written Motion to Dismiss and the supporting documentation in these matters. To clarify the State's position, it was outlined that the Motion to Dismiss was based on two assertions. The first is that the Office of Administrative Hearings (OAH) is without jurisdiction over these matters because the complaints are not grievances under Md. ANN. CODE, art. 64A, Section 52(b) (1988) and second, that the layoff provisions of MD. ANN. CODE, art. 64A,

Section 35 (1988) do not apply to positions abolished by operation of law. Elaborating further, the State's representatives asserted that Hopper v. Jones, 178 Md. 429, 13 A.2d 621 (1940) and various Attorney General opinions are dispositive of these matters. Continuing, it was noted that agency participation in identifying positions does not alter the fact that these positions were abolished by operation of law as defined in Hopper, supra. Accordingly, the State asserted that OAH has no jurisdiction and rested on its written memorandum and supporting documents.

Mr. Awalt reiterated and reaffirmed his written response to the State's Motion to Dismiss. Specifically, Mr. Awalt argued that the authority under MD. STATE. FIN. & PROC. CODE ANN. Section 7-213 (1988) is

really not at issue. Mr. Awalt conceded that there was a fiscal crisis and the Governor could abolish positions. He asserted, however, that the cause of complaint was not that positions were abolished but the method employed by the agencies to determine which employees lost their positions. According to Mr. Awalt, MD. ANN. CODE, art. 64A, Section 35 (1988) exists for the exact situation presented by these matters and the various appointing authorities could not ignore its mandate. Mr. Awalt asserted that the Hopper holding is brief and narrow and is certainly not controlling in these matters. Summarizing his positions, Mr. Awalt related that once the Governor, with the approval of the Board of Public Works, abolished positions then the Merit System Law directed the process of selecting which employees

actually lost their jobs.

Mr. Bigelow presented oral argument on behalf of those employees represented by AFSCME. He asserted that the cause of complaint is the arbitrary and capricious decision making process employed by the appointing authorities to determine which employees would lose their jobs. Mr. Bigelow rejected the assertion that the positions were lost by operation of law, stating that such a conclusion requires legislative action which is absent in these matters. He further asserted that Senate Bill (SB) 34 is not consistent with legislative action as defined in Hopper since it (SB 34) did not address abolition of positions but addressed local government and education appropriations. Mr. Bigelow argued that the merit system was designed to prevent what happened in these cases,

that is, political manipulation of public employment. In reference to Conway Bailey, Mr. Bigelow also argued that his rights under the Veteran's Administration Act were violated.

Daniel B. Loftus presented oral argument on behalf of Ms. Diane Bell. He asserted that the Grievant was not challenging the authority to abolish positions but the non-application of the layoff provisions by the appointing authority. Mr. Loftus pointed out that Elmer Tippett, Superintendent of the Maryland State Police, in response to an inquiry from Louis L. Goldstein, stated that he, and he alone, selected which employees were to be terminated. To support this, Mr. Loftus presented the written inquiry from Mr. Goldstein dated October 2, 1991 and Colonel Tippett's

response dated October 7, 1991. Continuing, Mr. Loftus asserted that Senate Bill 34 does not authorize the abandonment of the Merit System Law. He further argued that the Hopper decision is inapplicable to the present situation, since there was no legislative act authorizing the abolishment of Ms. Bell's position.

Mr. Bohn argued that OAH is the only avenue available to State employees to address the issues presented by these grievances. Mr. Bohn asserted that he is entitled to layoff rights since the agency determined which employees were to be terminated. He further noted that although the agency advised him that his termination was due to the elimination of the program, other individuals in his classification and program were not affected.

Mr. Watcher, after adopting Mr.

Awalt's oral and written arguments, stated that OAH has jurisdiction over this matter and that he is entitled to layoff rights.

In reference to the individuals formerly employed at the Department of Personnel, Ms. Josey argued that OAH has jurisdiction since the cause of compliant is based on the actions taken by Secretary Hilda Ford in deciding whom to terminate. According to Ms. Josey, it was Secretary Ford, after receiving input from the various divisions within Personnel, who decided which employees were to be eliminated. Ms. Josey asserted that Secretary Ford exercised total control over who was actually terminated. In reference to the applicability of the Hooper decision, Ms. Josey asserted that that decision is factually inapposite and therefore not controlling. Simply stated,

Ms. Josey contended that unlike Hopper, the terminations in the instant situation were not accomplished by any act of the General Assembly.

Leonard L. Lucchi, on behalf of Janet Gaylon, restated and reaffirmed his written response to the State's Motion to Dismiss. In his argument, Mr. Lucchi acknowledged that the Governor had authority to reduce appropriations by 25 percent. He argued however, that the Governor could not designate which positions should be eliminated or which employees should be terminated. According to Mr. Lucchi, it was left to the individual agencies to implement the budget cuts. Mr. Lucchi also argued that employees should have been given six months' notice before the closure of the Security State Police barracks.

FINDING OF FACTS ON THE MOTION

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Mr. Awalt and the State of Maryland by its attorney, the Office of the Attorney General, stipulated to the facts listed below. Although the other Grievants did not affirmatively join this stipulation, after careful review of the record, the stipulated facts are adopted as the facts relative to all of the cases.

1. All of the Grievants were employees of the State of Maryland at the time their jobs were abolished.

2. All Grievants lost their jobs by action of the Board of Public Works dated October 23, 1991 (Ex. I) as attached to the State's Motion to Dismiss.

3. None of the Grievants were given benefit of the layoff rights as defined in MD. ANN. CODE, art. 64A Section 35 (1988) and COMAR 06.01.01.44.

4. All of the documents submitted by

the Grievants and the State are genuine and authentic and admissible to the extent that this forum determines that they are relevant.

DISCUSSION

I. JURISDICTION

MD. STATE GOV'T CODE ANN. Section 9-1601 (1991) designates the Office of Administrative Hearings to adjudicate contested cases regarding certain non-exempted agencies. MD. ANN. CODE, art. 64A, Section 52 (1988) defines grievance as follows:

> (b) "Grievance" means any cause of complaint unless otherwise provided for under this article arising between an employee and his employer over the interpretation and application of State employee personnel rules, regulations, policies or any other rules, regulations or policies over which

management has control.

In order to determine if an issue presented is one within the jurisdiction of OAH, one needs to address two questions: "Who allegedly did wrong?" and "What was allegedly done wrong?". A basic understanding of the background which led to these contested actions is needed before those questions can be answered.

First, due to an impending fiscal crisis discovered subsequent to the enactment of the budget for fiscal year 1992, the Governor decided to exercise his authority under MD. STATE FIN. & PROC. CODE ANN. Section 7-213 (1988). (Hereafter referred to as Section 7-213). That section provides:

Section 7-213. Reductions.

(a) Authorized. -- Except as provided in subsection (b) of this

section, with the approval of the Board of Public Works, the Governor may reduce, by not more than 25%, any appropriation that the Governor considers unnecessary.

(b) Exclusions. -- (1) The Governor may not reduce an appropriation to the Legislative Branch or the Judicial Branch of the State government.

(2) The Governor may not reduce an appropriation for:

(i) payment of the principal of or interest on the State debt;

(ii) public schools; or

(iii) the salary of a public officer, during the term of office.

(3) Except as provided in the Merit System Law, the Governor may not reduce an appropriation for the salary of an employee in the classified or unclassified service. (An. Code 1957, art. 15A, Section 11, 1985, ch. 11, Section 2; 1986; ch. 377.)

On October 23, 1991, the Governor,

with the approval of the Board of Public Works reduced the appropriations of various agencies within the Executive Branch by not more than 25%. Prior to the actions of October 23, 1991, the General Assembly passed 1991 Md. Laws 2771, formally known as Senate Bill No. 34 titled The Budget Reconciliation Act for Fiscal Year 1992. The purpose of the bill was as follows:

> To authorize the Governor for Fiscal Year 1992 to reduce certain appropriations for certain State aid to the counties and Baltimore City; requiring the Fiscal Year 1992 certain local entities to pay for certain local employee retirement and social security costs; providing for the allocation of certain appropriations reductions among the counties and Baltimore City; authorizing the counties and Baltimore City and certain governmental units, subject to certain conditions, to take certain actions to meet their fiscal obligations under this Act: providing that, for a certain period, certain payments under the General Public Assistance Program and the Aid to Families with Dependant Children Program shall be at certain levels; requiring the District Court and

circuit courts to impose an additional court cost on certain criminal defendants in Fiscal Year 1992; prohibiting the court from waiving certain costs unless the defendant establishes indigency; requiring that certain funds be remitted to the Comptroller and credited to the General Fund; authorizing the Commissioner of Correction to deduct certain costs from certain inmate accounts; authorizing the Maryland Legal Services Corporation, for Fiscal Year 1992, to transfer certain funds to the Office of Public Defender to defray operating expenses of the Office; authorizing the State Department of Education in coordination with the Department of Public Safety and Correctional Services to employ, and change the employment status of, teachers and librarians in correctional educational programs on a 10-month per year basis; providing for the effective date of this Act; and generally relating to reconciliation of the State Budget for the 1992 Fiscal Year.

Also prior to the actions of October 23, 1991, the various affected agencies submitted a schedule of positions to be abolished to facilitate the reductions.

Thus, on October 23, 1991 armed with 1991 Md. Laws 2771 (Senate Bill 34) and the

schedule of positions submitted by the various agencies, the Governor with the approval of the Board of Public Works reduced certain appropriations.

Grievants, through their various representatives concede that the Governor could not act under Section 7-213. Most Grievants, albeit reluctantly and basically for the sake of argument, concede that the Governor with the Board of Public Works' approval could, pursuant to Section 7-214, suggest a reduction of the work force assigned to agencies within the Executive Branch.

Some of the Grievants' representatives in their reluctance to concede that the Governor could reduce the work force, place reliance on Section 7-213(b)(3). To counter that argument the State submitted a copy of the Revisor's Note to that

provisions. The Revisor's Note explains:

> In subsection (b)(3) of this section, the reference to an "employee in the classified or unclassified service" is substituted for the former, ambiguous reference to "merit system employees". The substituted language is based on Art. 64A, Section 30(a) of the code, which enables the Secretary of Personnel to increase or decrease pay rates of employees in either service, with the approval of the Governor.
>
> Chapter 11 of the Laws of Maryland 1985, Revisor's Note to S.F. Section 87-213.

Article 64A Section 30(A) (1988) of the Code authorizes the Secretary of Personnel "at any time to increase or decrease any rates of pay for all employees in the classified and in the unclassified services and said increased or decreased rate of pay shall after approval by the Governor apply to all employees in the classification or classifications so affected, including incumbent employees and new employees."

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After careful review of Section 7-213(b)(3) in conjunction with Article 64A, Section 30(a), I find the Revisor's Note instructive and the State's position regarding this portion of Grievant's argument persuasive. Section 7-213(b)(3), however, does not prohibit the reduction of appropriation or the reduction of the work force.

In reviewing both the Grievants' oral and written positions, it appears that Grievants are basically not contesting the Governor's action or the approval by the Board of Public Works. The decision that is being disputed, however, is the one made by the various appointing authorities regarding the methodology used to identify the positions to be abolished. Grievants uniformly contend that the appointing authorities had control over who was

selected and that it is this control coupled with non-application of the layoff procedures by the various appointing authorities which forms the basis for their grievances.

The State, on the other hand, contends that it was appropriation reduction pursuant to Section 7-213 which mandated the abolition of jobs. The State's position is that Section 7-213 is not a personnel rule, regulation or policy over which "management" had control. While it is true that the appropriation reduction was predicated on Section 7-213, it is equally apparent that the various agencies, upon request, submitted the information to the Governor identifying which jobs had been selected for abolition. It was this submission of information which dictated which jobs were abolished. The Governor

and the Board of Public Works did not randomly select Position Identification Numbers (PINs) but were supplied that information from the agencies. Since it was that information and that information alone which dictated which positions were abolished, it must be concluded that management exercised control over that decision. Management may not have had control over the fact that such reductions were necessary but they certainly maintained total control over selecting which positions were ultimately abolished.

In light of the above, the response to the question "Who did wrong?" must be "The various appointing authorities." As stated earlier, the Grievants' cause of complaint is aimed directly at the actions of the appointing authorities, not that of the Governor or Board of Public Works.

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The next question that must be addressed is "What was allegedly done wrong?" Grievants contend that the appointing authorities failed to comply with MD. ANN. CODE, art. 64A, Section 35 (1988). That section provides in pertinent part:

> Section 35. Laying off employees.
>
> (a) Applicability. -- The provisions of this section that govern the layoff and reinstatement of unclassified employees do to apply to the Board for the injured workers' insurance fund.
>
> (b) In general. -- Employees who are in positions that are to be abolished, discontinued, or vacated, because of a change in departmental organization or a stoppage or lack or work, shall be laid off.
>
> (c) Secretary to establish procedures. -- Except for faculty and other unclassified employees of the State institutions of higher education and their governing boards, the Secretary of Personnel shall establish uniform procedures among State agencies, by rule and regulation,

for:

(1) The layoff of State employees regardless of employment status; and

(2) The reinstatement of laid-off classified and unclassified State employees to comparable occupations positions in State employment.

The State, in its memorandum, contends that the process by which particular positions were selected for abolition is set forth at STATE. FIN. & PROC. CODE ANN. Section 7-103 (1988). That section provides:

Section 7-103. Studies.

(a) In general. -- (1) The Secretary shall continually conduct studies on the needs of units of the Executive Branch of the State government and of private entities to which the State appropriates money.

(2) To obtain the information that the Secretary wants in estimating the needs of the unit or entity, the Secretary may:

(i) question any officer or employee of the unit or entity; and

(ii) examine the records of the unit or entity.

(b) Revenue estimates. -- The Secretary shall:

(1) continually compare the needs of the units of the Executive Branch of the State government and of the private entities with the revenues that are collected;

(2) prepare estimates of revenues that will be available for the State budget;

(3) prepare other estimates of revenues that the Governor requests;

(4) study the revenue structure of the State;

(5) evaluate the sources of State revenues; and

(6) recommend to the Governor:

(i) appropriate changes in the revenue structure of the State; and

(ii) new sources of State revenues.

(c) Recommendations on State units. -- (1) The studies of the units of the Executive Branch of the State government shall include:

(i) program analyses; and

(ii) careful consideration of the administration, organization, functions, and duties of the units, to identify duplication or overlap.

(2) On the basis of the studies, the Secretary shall report to the Governor on changes that the Secretary believes would result in economy or efficiency or otherwise would be in the State's best interest, including:

(i) elimination or reduction of State programs;

(ii) abolition of positions;

(iii) changes in procedures; and

(iv) reorganization or consolidation of units.

(3) The Secretary shall send a

> copy of each report under this subsection to the Director of the Department of Fiscal Services. (An. Code 1957, art. 15A, Sections 17, 18, 22, 23; 1985, ch. 11, Section 2.)

The State's contention is that since this section is not a personnel regulation, there is no grievable complaint.

A review of the scenario of events as depicted by the State does not support the contention that MD. STATE FIN. & PROC. CODE ANN. Section 7-103 (1988) was utilized or that the positions to be abolished were a result of studies performed by the Secretary of Budget and Fiscal Planning pursuant to that section. Instead, the documentation establishes that the appointing authorities, by independent action, selected which positions to abolish. Furthermore, even if Section 7-213 was utilized, no where in that section

nor any other regulation quoted by the State is it even suggested that the layoff provisions of the Merit System Law are inapplicable.

To further support their position that OAH has no jurisdiction, the State cites Briscoe v. Prince George's Co. Health Dept., 323 MD. 439, (1991). The State contends that the above captioned case addresses a similar issues. The issue in the Briscoe case involved a request to amend the State Pay Plan under MD. ANN. CODE, art. 64A Section 27 (1988). The issue in the instant grievance is the non-application of the Merit System Law layoff provisions. There is no dispute that OAH would not have jurisdiction if the issue involved amending the State Pay Plan. However, that is clearly not the issue. The Briscoe case is factually distinctive

from the instant grievance, a distinction that makes the holding in that case inapplicable and of no precedential value to the issue at hand.

A review of the grievances and requested remedies supplies the answer to the question, "What was allegedly done wrong?" The Grievant's complaint is that the appointing authorities failed to apply the layoff provisions of the Merit System law in identifying the positions to be abolished. The layoff provisions outlined in MD. ANN. CODE, art. 64A, Section 35 (1988) are certainly personnel regulations. The decision not to apply the layoff provisions was one exercised solely by the various appointing authorities.

Thus, in light of the foregoing, the issue regarding jurisdiction must be resolved in favor of the Grievants. The

responses to the two questions identified as resolving the issue of jurisdiction establish that this matter is a grievance. The appointing authorities (management) are the alleged wrongdoers and the nonapplication of the layoff provisions (personnel regulations) is the alleged wrongdoing. Accordingly, based on the definition of grievance found in Article 64A, Section 52, this matter is a grievance within the jurisdiction of OAH.

II. APPLICABILITY OF LAYOFF PROVISIONS

Anticipating that it may be concluded that OAH has jurisdiction, the State also argued that the grievances should be dismissed since the Grievants are not entitled to their requested relief. Specifically, the State contends that the layoff provisions do not apply to jobs abolished by operation of law. To support

this contention, the State presents a two-tiered argument, first, that the actions of the Governor and Board of Public Works pursuant to Section 7-213 were legislative in nature and second, because those actions were legislative in nature, Grievants lost their positions by operation of law.

One of the cases cited by the State to support its position that the actions taken in the instant matter were legislative in nature is Mandel v. O'Hara, 320 Dm. 103 (1990). The case is cited by the State in its memorandum as follows;

> In Mandel v. O'Hara, 320 Md. 103 (1990), the Court of Appeals indicated that legislative power could be delegated to an executive agency and that when the agency exercised the power, it would enjoy legislative immunity. 320 Md. at 130.

After careful review and analysis of the Mandel case, a more accurate reading of its holding is that in deciding what type

of immunity applies to a State official's act, one must look at the function at issue, not the office. In Mandel, the Court concluded that the function at issue, vetoing a bill, was legislative in nature and therefore entitled former Governor Mandel to absolute "legislative" immunity.

Using the rationale and analysis outlined by the court in Mandel, a threshold determination in these matters is whether the functions being performed by the Governor and Board of Public Works were legislative or executive in nature. By definition, a legislative act is one which creates a law, while an executive act involves executing the law as it exists, or ministerial functions.

The court decision that the State places great reliance on to support its position that the Governor's and Board of

Public Works' action relative to these grievance was legislative in nature is Hopper, supra. In that case, the Governor proposed a budget which eliminated a specifically identifiable position, that of Mr. Hopper. The General Assembly passed the proposed budget, thereby, eliminating Mr. Hopper's position. The budget then became law. The court held that since the legislature discontinued the appropriation for a specifically identifiable position, the incumbent lost his position by operation of law and was not entitled to the lay off provisions.

In placing its reliance on Hopper, the State compares the acts in Hopper to what occurred in the instant grievances. According to the State the acts of the Governor and Board of Public Works in reducing appropriations were legislative in

nature, as was the budget proposal by the Governor in Hopper. Thus, any positions lost were done so by operation of law.

An understanding of the budget process in Maryland is necessary before any further discussion is undertaken. Maryland has an "executive budget system" which is defined in great detail in Maryland Action for Foster Children, Inc. et al. v. State of Maryland, et al., 279 Md. 133 (1977). That case is only being mentioned as informative regarding the budget process. Basically, in the executive budget system, the Governor has the responsibility to present the legislature with a complete statement of the needs and resources of the State through the budget bill (MD CONST. CODE ANN. Article III, Section 52(3), (4) and (5) (1988). (Hereafter referred presented to the legislature, the bill may be

debated, amended, revised or reduced (MD. CONST., Article III, Section 52(6) and (11). When passed by the General Assembly, the budget bill becomes law without any further action of the Governor. (MD CONST. Article III, Section 52(6)).

There appears to be a no dispute that the Governor is an integral part of the budget formulating process. His actions in formulating the budget, which ultimately becomes law, must certainly be defined as legislative in nature. The question is whether his actions, subsequent to the passage of the budget, are necessarily legislative in nature.

> MD. CONST., Article III, Section 52(13) specifies that:
>
> (13) The General Assembly may, from time to time, enact such laws not inconsistent with this section, as may be necessary and proper to carry out its provisions.

The General Assembly pursuant to the

above quoted section promulgated MD. ANN. CODE, art. 15A, Section 11, the predecessor to MD. STATE FIN. & PROC. CODE ANN, Section 7-213 (1988). Article 15A, Section 11 provided:

> The Governor shall have the power, with the approval of the Board of Public Works, to reduce not more than 25% of any item of appropriation which he may deem unnecessary, except appropriations for the payment of interest and the retirement of State debt, and appropriations to the legislature, the public schools and the judiciary; provided, however, that the salaries of public officers shall not be reduced during their term in office, and the salaries of merit system employees shall not be reduced except in accordance with the provisions of Article 64A of the Annotated Code of Maryland. No department, board, commission, officer or institution shall be authorized to expend any appropriation or part of an appropriation which the Governor shall reduce as hereinabove provided.

Thus, Section 7-213, as did its predecessor, authorizes the Governor to reduce appropriations after the enactment of the budget bill. Such action by the

Governor with the Board of Public Works' approval is not comparable to what occurred in Hopper. In Hopper, the Governor's action or inaction eventually became law. In the instant grievances, the reduction in appropriation did not create or change any laws. Neither is the action an amendment to budget as defined in Section 7-209. Governor with the approval of the Board of Public Works administered a law, Section 7-213. The result was a reduction in appropriations which limited the spending of specified agencies. Such action was a ministerial function, not a legislative act.

Thus, by examining the function being performed by the Governor and Board of Public Works as it relates to Section 7-213, it is clear that such action is executive, not legislative. Accordingly,

any results from exercising that function, such as job abolishment, are not legislative in nature. If the results are not legislative, then it cannot be concluded that the job abolition were by operation of law.

This finding does not "overrule" Hopper nor does it in any manner affect the holding in Hopper. There are some functions performed by the Governor which are legislative in nature, such as budget formulation and vetoing bills, while there are others which are not. The conclusion reached by this discussion is that in the instant grievances, the actions of the Governor with the Board of Public Works approval was executive, not legislative. Thus the jobs were not abolished by operation of law as defined by Hopper, supra.

The State also asserts that the passage of Senate Bill 34 is further proof that the positions were abolished by operation of law. That assertion must fail without further comment since SB 34 does not address the abolition of positions.

Several Attorney General Opinions were cited by the State as support for its positions. The earliest Attorney General Opinion submitted by the State, 64 Op. Att'y Gen. 146 (1979), specifically dealt with the Secretary of Budget and Fiscal Planning's authority and its relation to the grievance procedure which was not as issue in the instant grievances. The next opinion supplied by the State, 65 Op. Att'y Gen 45 (1980), although relating to the predecessor of SF 7-213 and thus informative is of little guidance regarding the applicability of the layoff provisions.

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Ironically, the next two Attorney General Opinions cited by the State are not in accord with each other. In 75 Op. Att'y Gen. No. 90-056 (Dec. 5, 1990), the Attorney General concludes:

> Under SF Section 7-213(a), the Governor, with the approval of the Board of Public Works, "may reduce, by not more than 25%, any appropriation that the Governor considers unnecessary." By this provision, "the General Assembly clearly has given the Governor extremely broad discretion to determine what ...the Governor...believes or considers should be treated as not required under the circumstances." 64 Opinions of the Attorney General 45, 51 (1980). If the Governor, with Board approval, exercised this "extremely broad discretion" to eliminate the funding of a group of positions and coupled the reduction with a budget amendment under SF, Section 7-209(b) to conform the appropriation to the reduction, those positions would be lost "by operation of law" fully as much as the position in Hopper. In the end, there would be no money to pay these employees and that, held the Court of Appeals, is a situation not addressed by Article 64A, Section 35. (emphasis added)

The most recent Attorney General

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Opinion which concludes that positions abolished pursuant to SF Section 7-213 are not entitled to the lay off provisions, 76 Op. Att'y Gen. No. 91-041 (September 5, 1991), does require that such action be coupled with Section 7-209(b). In the most recent Attorney General Opinion it is maintained that the Governor's actions under Section 7-213 alone are sufficient to constitute the operation of law. However, the reasoning in the earlier opinion clearly requires that the action under Section 7-213 must be coupled with Section 7-209 before it can be concluded that the action is by "operation of law". Not only does the latest opinion fail to require action under Section 7-209, it makes no mention whatsoever of that section. Therefore, these two Attorney General Opinions are in apparent conflict and

unpersuasive.

Accordingly, based on the above, the issue regarding applicability of the lay off provisions must be resolved in favor of the Grievants. The positions were not abolished by operation law and therefore, Grievants are entitled to the application of the layoff provisions. Grievants are advised, however, that this conclusion in no way assures reemployment. Full hearings on the merits are necessary to examine Grievants' rights pursuant to MD. ANN. CODE, art. 64A, Section 35 (1988).

CONCLUSIONS OF LAW

The burden of proof regarding the Motion to Dismiss rests with the State, as the moving party. After careful deliberation and based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that:

1. The cause of complaint presented by these grievances is one within the jurisdiction of the Office of Administrative Hearings; and that

2. The Grievants' positions were not abolished by operation of law.

Therefore, Grievants are entitled to rights afforded under the layoff statute, MD. ANN. CODE, art. 64A, Section 35 (1988).

ORDER

It is hereby ORDERED that the Motion to Dismiss, filed by State is DENIED. These matters will, therefore, be scheduled for hearings on the merits.

Date: February 25, 1992 Sondra L. Mackel
Administrative Law Judge